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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-421

JOHN M. BRYANT, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

No. 79-425

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

No. 79-435

IMPERIAL IRRIGATION DISTRICT, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Respondents are not satisfied with the shallow, misleading and often erroneous statement of the facts presented by petitioners. In view of these major shortcomings, it will unfortunately be necessary to go into great detail about the facts of this case in order to set the record straight.

The dispute before the Court involves a controversy between two groups of intervenors over the right to receive the federal water subsidy provided under the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. §§ 617, et seq., to the Imperial Valley of California.

1. PROCEEDINGS BELOW.

The government filed a complaint against petitioner Imperial Irrigation District (hereinafter "the District") on January 11, 1967, seeking a declaratory judgment determining whether or not the 160 acre limitation of the reclamation law applied to privately owned lands in the Imperial Valley.[1] This action followed refusal of the Imperial Irrigation District to require its excess landowners to execute recordable contracts as required by reclamation law. Prior to trial, intervention as defendants was allowed for owners of excess lands and the State of California.[2] Respondents requested and were granted leave to file a brief amicus curiae in support of the government. 1 CR 66, 72; 2 CR 27. The trial court entered judgment on February 7, 1971 in favor of petitioners (1 CR 125, Con.App. 317a) after filing its opinion. 322 F.Supp. 11;

[1] 1 CR 1, Con.App.267a. The following form of abbreviations will be used in this brief: "CR" will be used to designate the Clerk's Record; "Tr.", the trial transcript; "Dist.App.", the District's Appendix; "Dist.Br.", the District's Brief; "L.Br.", the Landowners' Brief; "L.App.", the Landowners' Appendix; "Con.App.", the Consolidated Appendix; "LX-", the Landowners' Exhibits and "Pl.Ex.", the Government's Exhibits.

[2] The orders allowing intervention are not in the record on appeal. Proper entries appear on the Docket Sheet attached to Vol. 1 of the Clerk's Record. These entries appear at Con.App. 357a.

1 CR 87; L.App. 70a. Before expiration of the time to appeal, respondents moved for leave to intervene in order to appeal the judgment. 2 CR 47, Con.App. 319a. Their motion was denied. 1 CR 165, Con.App. 352a. Respondents filed a protective notice of appeal from the judgment (2 CR 45) and appealed from the order denying leave to intervene. 1 CR 204. The government did not appeal the judgment.[3]

On August 6, 1973 a panel of the court of appeals reversed the order denying intervention. 559 F.2d 543, L.App. 56a. The only reason provided for allowing intervention was to prevent a decisional conflict within the circuit. Respondents were parties to a case in the district court seeking compliance with the residency requirement of § 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 431. They had obtained a judgment mandating the Secretary to enforce the residency requirement in the Imperial Valley. *Yellen v. Hickel*, 335 F.Supp. 200 (S.D. Cal. 1971) (partial summary judgment), 352 F.Supp. 1300 (S.D. Cal. 1972) (final judgment).

Oral argument on the merits of both the acreage and residency cases was calendared to be heard at the same time. On August 18, 1977, another panel of the court of appeals vacated the judgment in the residency case because of lack of standing. It then reconsidered and thereafter reaffirmed its earlier order allowing intervention in the acreage case and reversed the judgment on the merits. Petitioners moved for rehearing and suggested rehearing in banc. Rules 48(a), 35(b), Fed.R.App.P. The panel requested and received an Answer from respondents and considered the rehearing petition for a 20-month period. On April 23, 1979, the panel filed a supplemental opinion denying the

[3] A more detailed discussion of respondents' intervention is found *infra* at p. 69.

petitions for rehearing. 595 F.2d 525. Judges Browning and Koelsch voted to reject the suggestions for the hearing in banc and Judge Wollenberg recommended rejection of the suggestions. The full court was advised of the suggestions for in banc rehearing and no judge of the court requested a vote on the suggestions. 595 F.2d at 528. Petitioners filed timely petitions for certiorari and the Court granted the petitions for certiorari on December 3, 1979.[4]

2. HISTORIC BACKGROUND OF THE RECLAMATION ACT.

The anti-monopoly provisions of reclamation law have been before this Court on only one previous occasion, *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1958). *Ivanhoe* involved the application of the 160 acre limitation in the Central Valley of California. The statute involved was the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844 and, as amended, the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, commonly known as the Central Valley Project. The Court has never delved into the history of the Reclamation Act with an emphasis on the evolution of the anti-monopoly provisions, the 160 acre limitation and residency requirement. In the case at bench, the landowners treat that history only summarily and the District not at all. The contentions of petitioners pose a grave threat to the very underpinnings of the reclamation law and their claims must be viewed against the historic background of the law and national reclamation policy. To place the present controversy in proper context, respondents will set out the historical background of the Reclamation Act as summarized by Professor Sax, *Federal Reclamation Law,* 2 Waters and Water Rights, § 110, pp. 118, 113-122 (1967) (footnotes edited and renumbered):

[4]The Court granted petitions filed by the District, the Landowners and the State of California. All petitioners will be referred to jointly unless otherwise specified.

110—*Introduction*

Reclamation was the West's dramatic answer to Daniel Webster's rhetorical and unprophetic questions:

> What do we want with this vast worthless area—this region of savages and wild beasts, of deserts of shifting sands and whirlwinds of dust, of cactus and prairie dogs? To what use could we ever hope to put these great deserts and those endless mountain ranges, impenetrable and covered to their base with eternal snow?

Today the great physical structures of the reclamation program speak for themselves in refutation of those who doubted the potential of western development. The wisdom of the program as it has developed, however, has been a matter of continued controversy. To understand that controversy, one must know something of western history and the events surrounding the early disposition of the public domain. For any serious student of reclamation, this is a first and necessary task.

110.1—*Historical background*

Three circumstances brought about the passage of the first Reclamation Act: congressional determination to attack the evils of monopoly and corruption which had attended the disposition of the public domain; the drought decade which began in 1886 and demonstrated the inapplicability of humid-region land policies to the arid West; and recognition of the work of John Wesley Powell, who inspired and joined together the forces responsible for the Reclamation Act of 1902.

During the nineteenth century public attitudes about the West underwent a metamorphosis. The early view that the area west of the hundredth meridian was the Great American Desert, a desolate, worthless, and uninhabitable area, gave way to what historians have called the myth of the garden.[5] Supported by a cycle of unusually wet years, the pseudoscientific notion became current that settlement and cultivation tended to im-

[5]See Smith, *The Virgin Land.* ch. 16 (1950).

prove natural conditions—an idea which was summed up in the slogan "Rain Follows the Plough." This optimism fitted perfectly the political and social creed which saw settlement of a new frontier as a cure for the increasing ills of immigration, industrialization, and urbanization, such settlement to be achieved by the establishment of an independent yeomanry of small family farms. The best-known exponent of this vision was Horace Greeley, of whom the following statement is typical:[6]

> . . . if you strike off into the broad, free West, and make yourself a farm from Uncle Sam's generous domain, you will crowd nobody, starve nobody, and . . . neither you nor your children need evermore beg for Something to Do.

The Homestead Act of 1862,[7] with its promise of 160 acres of free land to those who would reside upon or cultivate it for five years, was designed to help men realize this dream. That the Homestead law largely failed in the West is well enough known,[8] but the basic reasons for its failure are worth recounting; they provided the historical basis upon which the architects of reclamation worked. First, the law failed to help potential homesteaders move across the country, to sustain themselves until they were self-sufficient, and to learn how to farm. Second, the law failed to prevent homesteads from falling into the hands of large owners and monopolists; it also neglected to revise other public domain laws which permitted the accumulation of large and desirable tracts by speculators. Finally, the provisions of the Homestead Act were totally inapplicable to arid-region conditions. A 160-acre tract was much too small for grazing—the only practicable use to which the land could be put without irrigation. Acquisition and improvement of land for irrigation were not possible without expenditures of capital which were infinitely beyond the means of the homesteader.

[6]Id., at p. 221.

[7]Act of May 20, 1862, ch. 75, 12 Stat. 392, 43 U.S.C. 161 et seq.

[8]See, e.g., Shannon, *The Farmer's Last Frontier*, ch. 3 (1945).

However misguided the Homestead Act was from the point of view of developing an independent western yeomanry, its provisions seem only mildly imprudent by comparison with other congressional schemes for disposing of the public domain. The Desert Land Act of 1877[9] permitted one, upon a small payment, to acquire up to 640 acres of arid land, provided he would irrigate it—a virtual impossibility; the Act was openly violated by the use of professional witnesses who would testify for a fee that they had "seen water upon the claim," meaning that a bucket had been emptied upon the ground in their presence. The law thus encouraged huge holdings by large sheep and cattle companies.

The Timber and Stone Act of 1878,[10] similarly implemented by the use of fraudulent claims filed by hired men, some at the small cost of a glass of beer, served to put millions of acres of invaluable timber land under the ownership of a handful of companies for a pittance. Meanwhile the choicest agricultural lands were acquired in great tracts by speculators and railroad companies and sold at large profits to settlers. While statesmen lauded the free-land policy, more land was actually sold to settlers by railroad companies than was conveyed under the Homestead Act, and the rate of tenancy on western farms rose steadily until 1900.

These land and water monopoly scandals set the stage for the development of a new political movement which led the struggle for a land policy that favored the family farm in fact as well as in theory. Such a movement was one of the essential preconditions to the development of federal reclamation policy, and it was the product of tragic experience in the early disposition of the public domain.

[9]Act of March 3, 1877, ch. 107, 19 Stat. 377, 43 U.S.C. 321 et seq.

[10]Act of June 3, 1878, ch. 151, 20 Stat. 89, 43 U.S.C. 311 to 313 (repealed by Act of August 1, 1955, ch. 448, 69 Stat. 434).

The second stimulus to reclamation policy was another tragedy: the drought decade which began in 1886. The blizzard winter of that year was a disaster for the great cattle companies, and its effects were political as well as economic. "The cattle interests which had gone a good way toward engrossing the Great Plains were not precisely stopped in their tracks, but they were slowed down, their power and their will to fight for their privileges temporarily weakened."[11] The drought not only weakened the opposition, but simultaneously gave the radical agrarian movement its most potent weapon—a vivid demonstration of the inadequacy of a land policy which merely offered the land, with nothing further in the way of Government aid.

Finally, there was John Wesley Powell, of whom Bernard DeVoto said, "He was a great man and a prophet."[12] Powell was a pioneer explorer of the Colorado River basin, a Union Army veteran who lost his right arm at Shiloh, a teacher, a geologist and ethnographer of note, a skillful political strategist and lobbyist, and—most significantly—a political philosopher who proposed a whole new system of government for the arid region, based upon the needs generated by the nature of the area rather than upon the standard preconceptions of distant legislators. Explosively revolutionary in the later nineteenth century, many of his major ideas have been or are being realized in some form today. River-basin planning is his concept; the water conservancy district as a unit of self-government is significantly his concept; land classification was one of his major themes.

The antimonopoly provisions which have figured so centrally in reclamation law were a direct outgrowth of Powell's proposals. He saw that "when the area to which it is possible to take the water of any given stream is much greater than the stream is competent to serve, if the land titles and water rights are sev-

[11]Stegner, *Beyond the Hundredth Meridian*, p. 295 (1954).
[12]Stegner, *Beyond the Hundredth Meridian*, p. xvi (1954).

ered, the owner of any tract of land is at the mercy of the owner of the water right. . . . If the water rights fall into the hands of irrigating companies and the lands into the hands of individual farmers, the farmers then will be dependent upon the stock companies, and eventually the monopoly of water rights will be an intolerable burden to the people."[13] To prevent this Powell proposed that "the right to use water should inhere in the land to be irrigated, and water rights should go with land titles."[14] He also suggested that if, after an opportunity of five years to irrigate his land, any owner should not do so, the right to the use of the necessary water to reclaim the lands should lapse.[15] Since, as Powell recognized, a new farmer needed to secure an inchoate right in water while he was preparing his land for utilization,[16] this latter provision was necessary to prevent the sale of "paper" water rights with lands that never actually were brought into cultivation.

Although Powell is quite uniformly recognized as the father of the reclamation program, his proposals never included the principal element of reclamation as it actually developed—the building and financing of irrigation works by the federal government. After proposing the classification of irrigable lands and the closing of the land to all but homestead entries, he suggested that any nine or more persons be entitled to join together to form an irrigation district which would be a model of cooperative self-government, distributing the waters and dividing the parcels in the shape most convenient for irrigation, so long as no one person got more than eighty acres.[17] Powell envisioned no overt role for Government in the development of irrigation; his view, quite wrong as we now

[13]Powell, *Report on the Lands of the Arid Region*, p. 40 (Govt. Print. Office 1879).
[14]Id., at p. 41.
[15]Id., at p. 32.
[16]Id., at p. 43.
[17]Powell, *Report on the Lands of the Arid Region*, pp. 30-32 (Govt. Print. Office, 1879).

know, was that "the increment of value given to lands by reason of their being irrigated is sufficient to pay the cost of constructing the irrigation works many times over. So there is no need of any Government aid. . . ."[18]

This conclusion does not suggest, however, that Powell fell victim to the typical naive myths about individual enterprise. Quite to the contrary, he was pre-eminently the advocate of comprehensive, large-scale planning for the arid West. He proposed integrated management of vast areas of timber, pasturage, and agricultural land; he proposed the investment of millions in large dams to control the major streams; he proposed the building of huge, joint reservoirs in the mountains, many miles from the land to be irrigated. He even talked quite openly about western water control as a "national" issue which was of great interest and benefit even to those on the lower Mississippi.[19]

To Powell such schemes—which to us seem impossible of achievement except by the national government—were a part of his vision of a whole new political structure for America, in which public entities created within hydrographic boundaries and embracing several states would, as "a great body of commonwealths" engage in vast new experiments in self-government.[20] Whether Powell actually believed his dream could come to pass or whether, as his biographer indicates,[21] he was merely concealing—for political purposes—his view that large-scale federal intervention was inevitable, is uncertain. In any event, with the rejection of his plan to reorganize the West along water-basin lines, there remained no institution

[18]11 U.S. Geol. Survey Ann. Rep., pt.2, p. 252 (1889-1890). See also Webb, *The Great Plains*, pp. 355-356 (1931).

[19]10 U.S. Geol. Survey Ann. Rep., pt. 2, p. 7 (1889-1890).

[20]This view is concisely delineated in 11 U.S. Geol. Survey Ann. Rep., pt. 2, at pp. 255-257 (1889-1890).

[21]See Stegner, *Beyond the Hundreth Meridian*, pp. 307-310 (1954).

capable of carrying out his plans except the national government.[22]

Whatever his reason, Powell judged correctly the mood of the Country at the time. In a sharply split report issued by the Senate Committee on Irrigation and Reclamation in 1890,[23] in which Major Powell's general views were the center of controversy,[24] both majority and minority agreed that reclamation was a matter for private enterprise:

> The question for consideration is: What action should be taken by the Government to enable the people to reclaim these desert lands? The reclamation must be initiated and executed by the people, and not by their Government. . . . If the opportunity is furnished to the people of this country they will reclaim these desert lands so far as reclamation is necessary. The use of industrial cooperation in developing the mineral resources of the far West demonstrates the capacity of the people for great undertakings which in other countries require vast expenditures of accumulated capital.[25]

As late as 1896 none of the leaders of the reclamation movement had yet advocated a federal construction program. The campaign for a reclamation program financed and built by the federal government cannot really be said to have begun until the last decade of the nineteenth century. Although suggestions of some federal aid to reclamation had been made officially as early as 1874, and though federal financing was mentioned in Congress by 1888, serious consideration of a federal building program began no earlier than 1894. At that time several factors combined to bring the

[22]The manifest failure of the Carey Act of August 18, 1894, ch. 301, § 4, 28 Stat. 422, 43 U.S.C. 641, indicated the inability of the states and private companies to do the job. See Shannon, *The Farmer's Last Frontier*, p. 216 (1945).

[23]S.Rep. No. 928, 51st Congress, 1st Sess. (1890).

[24]Powell's congressional travails are discussed in Stegner, *Beyond the Hundredth Meridian*, pp. 328-350 (1954).

[25]S.Rep. No. 928, 51st Congress, 1st Sess., pp. 7-8 (1890). The minority report, concurring in this view, is reported at pp. 142-143.

matter to congressional attention. The most important of these were the rise of the National Irrigation Congress as an articulate and influential pressure group; the depression beginning in 1894, with its accompanying financial failures among supposedly stable private irrigation companies; and a number of disastrous dam failures.

The first legislative reaction to these events was the abortive Carey Act[26] which sought to put the burden upon state and private initiative. The debates over that law, for which even its sponsor had small expectations, contained the first serious congressional consideration of the proposition that only the federal government was in a position to carry forward the work of reclamation. Such ideas were now acceptable because of the spadework done by enthusiasts like William E. Smythe of the National Irrigation Congress.

The Carey Act, as expected, resulted in very little reclamation. It was a demonstration of what was, by then, reasonably obvious—that large-scale reclamation works were not a profitable enterprise. This experience, rather than leading to abandonment of the movement or to promotion of reclamation as a non-reimbursable governmental expenditure, produced instead a third position, designed to refashion the reclamation program into a form acceptable to the prevailing political necessities. This new position required a showing that reclamation was a proper national concern, a test presumably met by the assertion that it was "as right for the national government to make the streams and rivers of the arid region useful . . . as to make useful the rivers and harbors of the humid region" by flood control.[27] Right or wrong,

[26]Act of August 18, 1894, ch. 301, § 4, 28 Stat. 422, 43 U.S.C. 641.

[27]35 Cong. Rec. 86 (1901) (President Roosevelt's message to Congress). The analogy to the rivers and harbor program had been suggested by an army engineer, Col. Hiram M. Chittenden, in Preliminary Examination of Reservoir Sites in Wyoming and Colorado, H.R. Doc. No. 141, 55th Congress, 2d Sess. (1897).

without regard to the many differences, at this point saying it made it so.

The proposal was then sweetened by the assertion that reclamation could be financially painless; the costs of reclamation would be paid by the proceeds of public-land sales, replenished through repayment of construction costs by the water users themselves. By 1900 the Republican party included in its national platform support of "adequate national legislation to reclaim the arid lands."[28] With the accession of Theodore Roosevelt to the presidency, the reclamation movement had at last the needed key to success. In his inaugural address Roosevelt enthusiastically endorsed a program of federal dam and reservoir building. Shortly thereafter Francis G. Newlands of Nevada introduced a bill in Congress; opposition was sharp and substantial, but Newlands had the votes and on June 17, 1902 the federal reclamation program was born.

110.2—*The reclamation program in brief*

The basic principle of the 1902 Reclamation Act was that the United States would build irrigation works from the proceeds of public-land sales in the sixteen arid western states. Texas was added as a reclamation state in 1906. Water thus provided would be made available to both public and private lands. In order to receive water, the irrigator had to agree to repay current maintenance costs each year, and to return the cost of construction in full within ten years, but without any interest. It was hoped that thereby a revolving fund would be created which would make reclamation economically self-sufficient.

In order to prevent monopolization, a number of safeguards were enacted. The law provided that water could not be sold for use on more than 160 acres in any individual private ownership, that the user had to be a resident or occupant upon the land, and that water rights were to be appurtenant to the land.[29]

[28]35 Cong. Rec. 6676 (1902).

[29]§ 5, 32 Stat. 389, 43 U.S.C. § 431.

During the succeeding years much of the Act has undergone great change. From a program limited to irrigation, reclamation has become one in which water may be provided for power, municipal, commercial, and industrial uses, although in general it still retains a preference for irrigation uses. Since 1911 the Secretary of the Interior has been authorized to make storage space available, and to sell surplus waters for use away from the project. In recent years increasing provision has been made for assuring recreation and fish and wildlife benefits in projects. Also, under the current multiple-use concept, such features as flood control and navigation may be included in reclamation projects; these elements, viewed as national benefits, are non-reimbursable and thus lighten the financial load for the immediate beneficiaries.

The original law gave the Secretary full authority to initiate projects as long as there was money in the reclamation fund. Today the law requires a rather complex feasibility study, designed to assure that projects are not only sound in engineering matters, but also worthwhile as investments for the United States (meaning that economic benefits will exceed the costs) and that the United States is reasonably assured of being repaid. While congressional authorization is not formally required, in practice each major project is individually authorized by Congress, often after lengthy hearings.

Despite the original plan, the reclamation program has never been self-supporting. Substantial construction moneys are appropriated from the general treasury; the ten-year interest-free time for repayment by irrigation users has in practice been extended to fifty years; and irrigation users—who pay only what they are deemed are able to afford—are subsidized in large part by power and municipal users. The Secretary is authorized to enter into water-service contracts as to some facilities without even observing the forty-year repayment time; and under such contracts water may be supplied in return for payment of little more than current operating expenses.

The original program, wherein the Secretary of the Interior dealt with each water user, has been supplanted by the requirement of a water users' association contract with the Secretary, undertaking the repayment obligation, backed by its power to tax lands within the project. Generally it is these associations which operate the distribution systems and deal with individual water users.

The simple prohibition upon selling the use of water to privately owned lands exceeding 160 acres has been subject to a good deal of elaboration, little of which has been effective. The basic changes in the law were designed to facilitate the breakup of large holdings. No landowner is required as such to sell his excess lands. But if he does not agree to sell them, he cannot receive project water for them. If he wishes to have project water for the excess lands, he must agree to sell them within a period set by contract, generally ten years. Even if the excess-land owner does not apply for project water for his excess land, if, before repayment is half completed, he sells those lands at a price exceeding that satisfactory to the Secretary (its value without enhancement by reason of the presence of the project, usually meaning its dry-land value), the purchaser cannot receive project water for the land.

Professor Sax summarizes the purpose and history of the excess land law (Sax, *supra,* section 120.1, pp. 210-214, footnotes edited and renumbered):

> Representative Francis G. Newlands, sponsor of the original Reclamation Act, made the most concise statement of the excess-land law's purpose:[30]
>
> > We have not felt in this country the evils of land monopoly. Lord Macaulay said we never would experience the test of our institutions until our public domain was exhausted and an increased population engaged in a contest for the ownership of land. That will be the test of the future, and the very purpose

[30] 35 Cong. Rec. 6734 (1902).

> of this bill is to guard against land monopoly and to hold this land in small tracts for the people of the entire country, to give to each man only the amount of land that will be necessary for the support of a family . . . . Convey this land to private corporations and doubtless this work would be done, but we would have fastened upon this country all the evils of land monopoly which produced the great French revolution, which caused the revolt against church monopoly in South America, and which in recent times has caused the outbreak of the Filipinos against Spanish authority.

To safeguard against monopoly, the 1902 act provided: "No right to the use of water for land in a private ownership shall be sold for a tract exceeding 160 acres to any one landowner."[31] While other antimonopoly and antispeculation provisions have been enacted, and will be mentioned, it is the acreage-limitation law which has been the center of attention and which will be discussed here.[32]

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[31]Act of June 17, 1902, ch. 1093, § 5, 32 Stat. 389, 43 U.S.C. 431. The later excess-land provisions are found in Act of August 9, 1912, ch. 278, § 3, 37 Stat. 266, as amended, 43 U.S.C. 544; Act of August 13, 1914, ch. 247, § 12, 38 Stat. 689, 43 U.S.C. 418; Act of May 25, 1926, ch. 383, § 46, 44 Stat. 649, as amended, 43 U.S.C. 423e.

[32]Also significant were the appurtenance provision, tying the water to the land and preventing speculation in water rights as such, Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 390, 43 U.S.C. 372, and the residency requirement, Act of June 17, 1902, ch. 1093, § 5, 32 Stat. 389, 43 U.S.C. 431 (discussed at section 121 infra) designed to protect against absentee ownership. Other laws, such as the cultivation requirement, Act of August 13, 1914, ch. 247, § 8, 38 Stat. 688, 43 U.S.C. 440, designed to prevent land being held out of production for speculative purposes, came later.

A variety of the other antispeculation provisions apply only to publicly owned lands. See Dept. of the Interior, *Acreage Limitation Policy*, pp. 3-4, 8-9, Study Prepared for the Senate Committee on Interior and Insular Affairs, 88th Congress, 2d Sess., (Committee Print, 1964) (hereafter cited as *Acreage Limitation Policy*).

Good general discussions of the problems of landownership in reclamation law are contained in two Government publications. *Acreage Limitation Policy*, and Dept. of the Interior, Bureau of Reclamation, *Landownership Survey on Federal Reclamation Projects* (Govt. Print. Office, 1946) (hereinafter cited as *Landownership Survey*).

The early years of reclamation demonstrated that merely restricting water sales was not sufficient to prevent speculation and monopoly. The purposes of the law were being frustrated by two practices which were not regulated by the 1902 statute. First, owners of large acreages were holding much of their excess lands out of production, speculating that they would rise in value as land became more scarce. This practice delayed the use of project lands for production which would begin to help repay construction costs. Second, when owners sold their land, they often reaped huge profits, since the market value of the land included the value of the prospect of project water. Thus large owners in effect capitalized the federal subsidy for their own benefit, to the detriment of their purchasers,

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The literature on the excess-land law is quite extensive. See Graham, *Some Aspects of Federal-State Relationships in California Water Resources Development*, p. 146 (1961); Taylor, Excess Land Law: Calculated Circumvention, 52 Calif. L. Rev. 978 (1964); Taylor, Excess Land Law: Secretary's Decision? A Study in Administration of Federal-State Relations, 9 U.C.L.A. L. Rev. 1 (1962); Taylor, The Excess Land Law: Pressure vs. Principle, 47 Calif. L. Rev. 499 (1959); Taylor, The Excess Land Law: Legislative Erosion of Public Policy, 30 Rocky Mt. L. Rev. 480 (1958); Taylor, Excess Land Law on the Kern?, Calif. L. Rev. 153 (1958); Taylor, Destruction of Federal Reclamation Policy? The Ivanhoe Case, 10 Stan. L. Rev. 76 (1957); Trelease, Government Ownership and Trusteeship of Water, 45 Calif. L. Rev. 638 (1957); Comment, The Ivanhoe Decision: The Validity of Contracts Containing the 160 Acre Limitation, 45 Calif. L. Rev. 763 (1957); Taylor, The Excess Land Law: Execution of a Public Policy, 64 Yale L. J. 477 (1955); Taylor, The 160-Acre Water Limitation and the Water Resources Commission, 3 West. Pol. Q. 435 (1950); Graham, The Central Valley Project: Resource Development of a Natural Basin, 38 Calif. L. Rev. 588 (1950); Maass, Administering the CVP, 38 Calif. L. Rev. 666 (1950); Note Acreage Limitation: Policy Considerations, 38 Calif. L. Rev. 728 (1950); Fuller, Acreage Limitation in Federal Irrigation Projects With Particular Reference to the Central Valley Project of California, 31 J. Farm Econ. 976 (1949); Taylor, Central Valley Project: Water and Land, 2 West. Pol. Q. 229 (1949); de Roos, *The Thirsty Land* (1948); Downey, *They Would Rule the Valley* (1947).

who were the bona fide settlers on the land and the intended recipients of the subsidy.

Laws were passed in 1912[33] and 1914[34] in an attempt to remedy these problems. The 1914 act authorized the Secretary to require that certain portions of the land be cultivated within three or five years,[35] under penalty of having the water right canceled, and to impose an annual 5% increase in construction charges for land held out of cultivation.[36] The act also provided that before construction began, owners must agree to dispose of excess lands upon such terms and at such price as the Secretary should designate; the penalty for refusal to sell was that the land would be excluded from the project.[37] This agreement-to-dispose provision was the model for the current excess-land law.[38]

Formidable as these provisions might seem, they were quite ineffective; an independent fact-finding commission reported in 1924 that, in its antimonopoly and antispeculation purposes, the reclamation law had failed.[39] The basic reasons for failure were these: first, the arrangement used for controlling the sale price did not prevent sales to middlemen who were free to resell without restriction;[40] second, and perhaps even more important, sales of excess lands were required only after the issuance of public notice, which was often delayed indefinitely, and the law was interpreted to permit the delivery of water to excess lands prior

[33]Act of August 9, 1912, ch. 278, § 3, 37 Stat. 266, 43 U.S.C. 544.

[34]The relevant sections of the 1914 law were: Act of August 13, 1914, ch. 247, §§ 8, 9, 12, 38 Stat. 688, 689, 43 U.S.C. 440, 464 418.

[35]Act of August 13, 1914, ch. 247, § 8, 38 Stat. 688, 43 U.S.C. 440.

[36]Act of August 13, 1914, ch. 247, § 9, 38 Stat. 689, 43 U.S.C. 464.

[37]Act of August 13, 1914, ch. 247, § 12, 38 Stat. 689, 43 U.S.C. 418.

[38]The current governing provision is § 46 of the Omnibus Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 649, as amended, 43 U.S.C. 423e.

[39]*Federal Reclamation by Irrigation*, S. Doc. No. 92, 68th Congress, 1st Sess. (1924).

[40]*Landownership Survey*, p. 42.

to their sale.[41] Excess-land owners were thus able to receive project water for their excess lands for very long periods—precisely the result the reclamation law was designed to prevent; and when they did sell, they were able to reap as speculative profit the capitalized value of the federal subsidy. It need hardly be said that these results were due to more than merely technical loopholes in the statutes. Then, as now, administrative interpretation and enforcement of the excess-land law was less than vigorous.[42]

The law took its present statutory form in 1926.[43]

Other commentators have emphasized the clear and unequivocal purpose of the law to encourage and maintain family-sized farms for persons who live on their subsidized land. On February 6, 1902, one of the co-sponsors of the National Reclamation Act, Senator Hansbrough of North Dakota, introduced the reclamation bill in the Senate in these words:

> Mr. President, the purpose of this measure is to assist in providing homes for the rapidly increasing population of the country. 35 Cong. Rec. 6734 (1902).

One supporter of the original legislation, Congressman Frank Mondell of Wyoming, praised the 1902 legislation:

> It is a step in advance of any legislation we have ever had in guarding *against the possibility* of speculative landholdings and *in providing for small farms and homes* on the public land, while it will also compel the division into small holdings of any large areas

[41]Ibid.

[42]*Acreage Limitation Policy*, p. xiii:

> In the 35 years since the last iteration by Congress of the principle of land limitation, both Congress and the executive branch have on occasion exhibited a degree of concern for the excess-land owner which may be difficult to reconcile with the policies embraced by the excess-land laws.

[43]Act of May 25, 1926, ch. 383, § 46, 44 Stat. 649, as amended, 43 U.S.C. 423e.

. . . in private ownership which may be irrigated under its provisions. 35 Cong. Rec. 6677 (1902), [emphasis added].

The House Committee Report on the 1902 Act made it crystal clear that the purpose of the new legislation had as its prime purpose the irrigation of lands for actual settlers. The report noted that all major political parties had declared themselves in favor of this vast new undertaking by the National Government.

> No more defendable measure has ever been presented to any Congress. No measure relating to the settlement and development of the public lands has ever been so carefully guarded in the interest of the homemaker and against the designs of the speculative entryman. No legislation presented to an American Congress has had all of its provisions more carefully and totally considered in all of their hearings. *Reclamation of Arid Lands,* Committee on Arid Lands, H.R. Rep. No. 1468, 57th Cong., 1st Sess. 4-5 (1902).

The report noted that the bill was carefully considered against the accumulation of large holdings of irrigated lands in single ownership and would compel the breaking up of large tracts by "limiting the area of lands the property of any one landowner for which a water right may be acquired to 160 acres and requiring residence or occupancy of the land by the owner. No non-resident can secure a water right." *Id.* at 8.

> To aid in the reclamation of the desert and in establishing there a home-owning population will not only vastly increase the strength and prosperity of the entire nation, but is a duty which the Government cannot escape, which is paramount in importance to every other duty now laid upon the American people. *Id.* at 16-17.

The object of the legislation was never in doubt.

> The object of the Reclamation Act is not so much to irrigate the land as it is to make homes. President (Theodore) Roosevelt in his message to this Congress today and in every previous message to this Congress and to the Congress of the United States, has emphasized again and again that the primary object of the law was to make homes. It is not to irrigate the lands which now belong to large corporations, or even to small ones; it is not to make these men wealthy; but it is to bring about a condition whereby that land shall be put into the hands of the small owner, whereby the man with the family can get enough land to support that family, to become a good citizen and to have all the comforts and necessities which rightfully belong to an American citizen. Graham, *The Central Valley Project, Resource Development of a Natural Basin,* 38 Cal.L.Rev. 588, 617, n.95 (1950), quoting F. M. Newell, first head of the Reclamation Service, and Citing Official Proceedings of the National Irrigation Congress 28 (1905).

In the respected commentary recognized as authoritative on the reclamation law by this Court[44] and others,[45] *The Excess Land Law: Execution of a Public Policy,* 64 Yale L.J. 477 (1955), Paul S. Taylor reports as follows:

> On May 12, 1903, President Theodore Roosevelt addressed the students at Stanford University on conservation. After noting that the early land laws had been "twisted to an improper use so that . . . they tend

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[44] *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 292 (1958).

[45] *Ivanhoe Irrig. Dist. v. All Parties,* 53 Cal.2d 692, 707, n. 4, Cal. Rptr. 317, 350 P.2d 69 (1960); *State of Washington v. Udall,* 417 F.2d 1310, 1312, n. 1, (9th Cir. 1969); *Israel v. Morton,* 549 F.2d 128, 133 n. 3 (9th Cir. 1977) *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093, 1140, n. 185, (9th Cir. 1976), *cert. denied,* 429 U.S. 1121; *Yellen v. Hickel,* 335 F.Supp. 200, 208 (S.D. Cal. 1971), *vacated sub nom; Yellen v. Andrus,* 559 F.2d 509 (9th Cir. 1977); and the opinion of the Ninth Circuit in the case at bench, 559 F.2d at 521.

to create a class of men who . . . obtain large tracts of soil for speculative purposes, or to rent out to others," he charged the students to take leadership in "securing the right use of the waters, and of seeing to it that our land policy is not twisted from its original purpose, but is perpetuated . . . to turn the public domain into farms each to be the property of the man who actually tills it and makes his home on it." He put his finger upon the crucial weakness, saying that "good laws alone will not secure good administration," and adding, two days later in San Francisco, that "no public man worth his salt will be other than glad to be held accountable" by a private citizen.

Less than a year earlier President Roosevelt had signed the National Reclamation Bill to accomplish the very objectives he described at Stanford. "If it was not for the national irrigation act, we would be about past the time when Uncle Sam could give every man a farm." Under that law, the federal government undertook to prepare arid lands for settlement by constructing reservoirs and canals. In order to bring the price within reach of the settlers, it advanced the cost of construction free of interest, the capital alone to be repaid, and that only after a period of years. Public lands so irrigated were to be distributed in small units to actual settlers under the Homestead laws, and private lands were to receive water in limited quantities. The urge was strong to repair the damage of "laws twisted into an improper use," to curb land monopoly and to favor the homemakers. *Id.*, at p. 479.

Because of the inadequacy of anti-speculation clauses and the unrealistic harshness of the repayment formula in the original act, financial disaster struck the reclamation program. Professor Sax discussed the purposes of the remedial legislation leading up to the enactment of Section 46 of the Omnibus Adjustment Act of 1926:

> The rate of economic failures created by the combination of land speculation and a rigid repayment

schedule was tremendous, and the settlers naturally turned to Congress for relief. The precise question was whether the repayment obligation should be reduced in order to permit the settlers on the projects to survive financially, but at the same time to permit the selling landowners to reap their profits.

In the context in which the problem arose, the solution seemed easy. Those who had been profiting at the expense of the repayment fund, were principally large landowners and speculators whom there was neither need nor desire to aid. They were merely parasites—real estate manipulators who, without ever settling on or improving the land themselves, reaped enormous profits from the enthusiasm and naivete of the true settlers to whom they sold. The need appeared to be merely to get the land into the hands of genuine settlers with dispatch, and at reasonable prices. Once that had been done and the speculators had been squeezed out, the basic structure of the reclamation plan could go forward as originally planned. The true settlers would prosper, and the investment of the United States would be once again secure. Sax, *Selling Reclamation Water Rights; A Case Study in Federal Subsidy Policy,* 64 Mich.L.Rev. 13, 17-18 (1965).

3. THE RECLAMATION PROGRAM AND PRIVATE LANDS.

The Reclamation Act, originally enacted in 1902 and supplemented on numerous occasions thereafter, provides in general for the construction and operation by the Government of various dams and appurtenant facilities for the purpose of storing, conserving and regulating the supply of water in the Western states. Although couched in terms which appear to limit its application to the "re-claiming" of arid public lands, privately owned lands having privately developed means of irrigation have been brought into reclamation projects almost from the beginning of the reclamation program in 1902. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 283 (1958); *United States v. Tulare*

Lake Canal Co., 535 F.2d 1093, 1112 (9th Cir. 1977), *cert. denied*, 429 U.S. 1121. As far back as 1903, the First Annual Report of the Reclamation Service said:

> Recognizing the fact that there is scarcely a section of the country in the United States, even in the most sparsely settled regions of the West, where an irrigation project would not involve the reclamation of lands in *private ownership*, as well as those belonging to the United States, this section [§ 5 of the 1902 Act, 32 Stat. 389, 43 U.S.C. § 431] authorizes the sale of the right to use water for land in private ownership, to be limited, however, to the amount required for a tract not exceeding 160 acres. (emphasis added). *First Annual Report of the Reclamation Service*, H. Doc. No. 79, 57th Cong., 2d Sess. 70 (1902).

Landowners have distorted the legislative policy of the Reclamation Act respecting private lands. By picking out bits and pieces of testimony from what they consider to be the legislative history of the reclamation program completely out of context, they imply that the obligations of § 46 were never intended to apply to privately owned lands previously developed by private means. L.Br. 20. With specific reference to § 46 of the 1926 Act, they rely on out of context references in Congressional committee proceedings in 1924, arguing that § 46 "envisioned sales of idle sage brush land acquired by speculators at prices like $5 per acre; they did not contemplate forced divestiture of cultivated lands owned by bona fide farmers, at appraised prices far below the investment costs of the farmer-owner." *Ibid.* The actual history of § 46 is radically different. In discussing the application of § 46, Congressman Crampton spoke of one of the new projects under consideration by Congress. He pointed out the new legislation was expected to cover situations exactly like those existing in the Imperial Valley:

> As to the Salt Lake project. The original purpose of reclamation was to develop the public lands of the West: To provide cheap homes to settlers; to take care of reclamation problems where several States were involved and the interstate rights might come into play; or tremendously large projects like the Boulder Canyon projects, where many States are involved and the expenditure is enormous, or where other problems, such as power and its proper conservation for the public use came into play. The Salt Lake project, as I understand it, is this: An area of land, entirely in private ownership and entirely settled and under irrigation, has an insufficient water supply for the whole season. They desire to turn from field crops that mature early to garden truck, and so forth, which would require a longer growing season; but their water supply fails them in early July. 66 Cong. Rec. 85-86 (1924), Pl. Ex. 67e.

If privately developed lands were to be exempt from § 46 or any other provisions of reclamation law, presumably landowners would have no difficulty providing ample citations to supporting authority. The reason for this shortcoming is obvious. The statistics of private lands participating in the reclamation program speak for themselves.

On the 25 reclamation projects authorized in 1910, one-half the irrigable acreage was privately owned prior to the authorization of the projects, and two-thirds were privately owned by the time water was available.[46] The committee of experts, known as the "Fact Finders," appointed by Secretary of Interior Hubert Work to advise him about needed changes in the reclamation program, reported that by 1922, 83 per cent of the acreage irrigated under the reclamation program was privately owned land.[47] The Fact

[46] *Fund For Reclamation of Arid Lands*, H.R. Doc. No. 1262, 61st Cong. 3d Sess. 20-21 (1911).

[47] *Federal Reclamation by Irrigation*, S. Doc. No. 92, 68th Cong., 1st Sess. 133 (1924).

Finders also reported that about 60 per cent of all land being irrigated at that time from government works was privately owned at the time of opening.[48]

The Fact Finders went on to state that large areas of land were "brought under irrigation by private ventures . . . [but] had an insufficient water supply for full-crop production. Usually this insufficiency was due to a water shortage at the critical growing period."[49] They reported that the reclamation service found "many meritorious private projects which were in trouble" and which "usually needed a better water supply or were in debt and unable to complete the work. There were many cogent reasons why the service should look with favor on a policy which would rescue these enterprises from threatened disaster. In some cases they had marked advantages over any new works on public land."[50]

They accurately observed, "the situation created by the inclusion of privately owned land in Government projects deserves more attention that it has received."[51] The Fact Finders Report makes it crystal clear that private lands constituted a major portion of the reclamation program.[51a]

It is significant that the subject bill of the 1924 hearings to which landowners made reference, H.R. 8836, (L.Br. 20) was the Act of December 5, 1924, known as the Fact Finders' Act, 43 Stat. 701, 43 U.S.C. §§ 371, 376, 412, 417, 433, 462, 466, 478, 493, 494, 500, 501 and 526. The legislative history of that Act shows that lands developed privately were to be included within projects and the value of those private improvements were to be considered in

[48] *Id.* at 124.
[49] *Id.* at 61.
[50] *Id.* at 131.
[51] *Id.* at 124.
[51a] *Id.* at 4, 116, 132-33.

determining the appraised value for purposes of selling excess lands. *Hearings on H.R. 8836 and H.R. 9611,* Before House Comm. on Irrig. and Reclamation, 68th Cong., 1st Sess. 40-41, 330, 331, 334 (1944).

As a result of the Fact Finders Report and its recommendations, Congress enacted § 46 of the Omnibus Adjustment Act in 1926. Nowhere in the legislative history of Section 46 or of any other provision of reclamation law is there a distinction between private and public lands or between lands that are developed and not developed.

The existence of pre-project irrigation facilities, such as those in the Imperial Valley and elsewhere, is without significance when considering the application of reclamation law. This Court has already concluded that § 46 applies even though the area had been reclaimed by private means. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. at 283. Bringing "new water" to an area is not the only, or even the primary, benefit of the reclamation program. The regulated flow of stored water is the major benefit of a reclamation project. *United States v. Tulare Lake Canal Co.,* 535 F.2d at 1113.

4. THE RECORDABLE CONTRACT UNDER RECLAMATION LAW.

The recordable contract found in § 46 is a statutory device unique in the law. Under reclamation law, owners of farmland may receive project water for up to 160 acres in an individual ownership. If they want to receive the water subsidy for their excess lands, § 46 provides that they must execute "valid recordable contracts for the sale of such (excess) lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior". The sale price is to be determined by an appraisal "in

a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works". Under the specific terms of § 46, excess lands are to be sold at "ex-contract" or below market prices. After there has been an initial breakup of excess landholdings, the price control mechanism of § 46 applies until one-half of the construction costs of the irrigation works have been repaid.[52]

The Secretary in authorized by § 10 of the 1902 Act to adopt regulations for carrying out the purposes of the Act. 32 Stat. 390, 43 U.S.C. § 373. On August 22, 1977, acting under his statutory authority in response to an order of a federal district court in the District of Columbia,[53] the Secretary announced proposed regulations for implementing the mandate of reclamation law and further defining the procedures to be followed with respect to the recordable contract.[54] In pertinent part, the Secretary summarized the regulations as defining "more specifically the procedure by which excess lands should be sold and who can qualify as purchasers to fulfill the purpose of reclamation law so that low-priced federal water be used as a means of encouraging the establishment of genuine small family farms."[55] Specific procedures provide for placing "limitations on the leasing of both excess and non-excess

[52]The statutory and administrative background of the recordable contract provision of § 46 was analyzed in great detail by Chief Judge Browning in *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1118-1144 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121.

[53]*National Land for People, Inc. v. The Bureau of Reclamation*, Civil Action No. 76-928.

[54]43 C.F.R. § 426, Dist.App. 217a.

[55]*Id.*, Dist.App. 218a.

land benefited by low-priced federal water",[56] and, of particular significance to the case at bench:

> The regulations alter the procedures by which excess land are sold, to allow a large number of prospective purchasers a better opportunity to participate in the reclamation program. For example, the past practice of allowing an excess land seller to arrange privately for sale is abolished. The Department will announce the availability of such lands, and choose among prospective purchasers by lottery or other impartial means.[57]

The Secretary recognized the policy objectives of the Reclamation Act of limiting the area of land for which water may be supplied and requiring the landowner-recipients of the water subsidy to reside on or in the neighborhood of the land to be irrigated:

> (a) To provide opportunity for a maximum number of farmers on the land.
>
> (b) To provide widely the benefits from public-supported reclamation because interest-free money and low-priced water are involved.
>
> (c) To promote the family-sized owner-operated farm.
>
> (d) To preclude the accrual of speculative gain in the disposition of excess land. § 426.1, Dist. App. 221a-222a.

An "eligible nonexcess owner" is defined as an individual "who (1) has his or her principal place of residence on or in the neighborhood of the land or who has under oath stated his or her intent to establish such principal place of residence within three years of acquisition of the land; (2) will not, after the acquisition, be the owner of more than 160 acres of land which receives water from any

[56]*Id.*, Dist.App. 219a.

[57]*Ibid.*

Federal project governed by reclamation law; and (3) has met all other requirements of reclamation law and these rules." § 426.4(1), Dist. App. 229a.

Water may be delivered to excess land "only if the owner, under terms and conditions satisfactory to the Secretary, executes a valid recordable contract for the sale of that land to a nonexcess owner. The sale price must not reflect value that can be attributed to the construction of the project." § 426.5(a), Dist. App. 230a-231a.

Under the *Tulare* formula (*United States v. Tulare Lake Canal Co.*, 535 F.2d at 1118-1144), the Secretary will exercise price approval for "all land under recordable contract, regardless of status of payment of construction charges". § 426.10(a)(2), Dist. App. 237a. Only excess lands are subject to the recordable contract. To provide against possible speculation in the resale of excess lands after the initial breakup, the regulations follow the requirement of § 46 in providing for price control by the Secretary "until one-half of the total construction costs allocated to irrigation have been paid." § 426.10(a)(1), Dist. App. 237a.

The practice of the Secretary has been to allow an excess landowner 10 years to dispose of his excess lands. Of course, he would be provided the water subsidy during this time. If there was any suggestion of possible reluctance on the part of large landowners to execute recordable contracts because of hardship or any other reason, it was removed in these eloquent terms by the Chief Counsel for the Imperial Irrigation District in congressional testimony:

> Let us lay the cards on the table . . . I will give you my own opinion of Jack O'Neill's willingness to sign the 160 acre limitation. He thinks if he gets water for ten years on there without having to sell it, he can make enough money out of it so he can afford to sell it at any old price. *Hearings on S. 1425, 2541, 3448,* Before Sub-comm. on Irrigation and Reclamation of Sen. Comm. on Interior and Insular Affairs, 85th Cong., 2d Sess. 87, 88 (1958).

5. THE BOULDER CANYON PROJECT ACT AND THE IMPERIAL VALLEY.

The development of one part of the Colorado Desert into the lush Imperial Valley and the taming of the once wild and erratic Colorado River, are reported elsewhere in great detail.[58] It is virtually impossible to over-estimate the need for the Colorado River for the life of the Imperial Valley. In large portions of the lower basin, true desert conditions prevail and, without the resources of the Colorado River system, now entirely dependent upon the Project Act, human life could not be maintained in these areas. Report of the Special Master 15.

The Colorado River has been called the "river of controversy" and has become one of the most litigated, regulated and argued about rivers in the world.[59] It was to the Colorado River where Californians initially turned for the means of opening the rich desert lands of the Imperial, Coachella, and Palo Verde Valleys to agriculture.

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[58] *Arizona v. California*, 373 U.S. 546, 552-64 (1963); Report of the Special Master in *Arizona v. California*, No. 10 Original, 15-44, 53-55; Gates, *History of Public Land Law Development*, 635-98 (1968); 3 *Kinney Law of Irrigation and Water Rights and the Arid Region Doctrine of Appropriation of Water*, 2237-46 (1912); Taylor, *Water, Land, and Environment, Imperial Valley: Law Caught in the Winds of Politics*, 13 Natural Resources J. 1 (1973); the opinion of the district court, 352 F.Supp. at 1312-17; the opinion of the Ninth Circuit, 559 F.2d at 514-15; *Yellen v. Hickel, supra*, 352 F.Supp. at 1312-16; a Stipulation of Facts found in the record at 2 CR 6-24; California Water Atlas, 38-39 (1979); Hundley, *Water and the West* (1975); Caughey, *California* 480-83 (1940); Watkins, *Illustrated History of California*, 307-312, 385-391 (1973); Poli, *Landownership and Operating Tenure in Imperial Valley, California*, U.S. Department of Agriculture, Berkeley, Calif. (1942); *Report of the All-American Canal Board*, S.Doc. 109, 66th Cong., 1st Sess., 17-21 (1919), Pl. Ex. 59.

[59] California Water Atlas 38-39 (1979).

The first person who conceived of irrigating the Imperial Valley with a gravity-fed canal from the Colorado was Oliver M. Wozencraft, a one-time Indian agent who conceived of this idea as he crossed through the area on his way to the gold fields in 1849. It was reported that his scheme floundered upon his determination to own not only the water system but the land it serves as well. Although the State legislature endorsed his request for a Federal grant of 1,600 square miles of the public domain in 1859, Congress refused to go along.[60]

In 1896, the California Development Company was organized under the laws of New Jersey by Charles R. Rockwood and C. N. Perry, construction engineers for the Southern Pacific Railroad, and Anthony Heber and Samuel Fergusson, land agents for the Kern County Land Company, for the purpose of diverting water from the Colorado River to irrigate the arid lands in the Imperial Valley and Republic of Mexico. It was considered necessary at that time, in order to irrigate lands in the Imperial Valley, to divert Colorado River water via the bed of an ancient overflow channel known as the Alamo River through Mexico and then back in a northerly direction into the United States.[61]

In order to provide for the passage of water first south into Mexico and then, after passing through the Alamo Canal back into the Imperial Valley, the California Development Company organized a Mexican company in 1898 named La Sociedad de Yrrigacion y Terrenos de la Baja California. The stock of the Mexican company was wholly

[60] *Id.* at 39.

[61] *Id.* at 39; 2 CR 11; Watkins, *California: An Illustrated History*, 308 (1973), hereafter "Watkins"; Taylor, *Water, Land and Environment, Imperial Valley: Law Caught in the Winds of Politics*, 13 Natural Resources J. 1, 4 (1973), hereafter "Water, Land and Environment", citing Hosmer, *Triumph and Failure in the Colorado Desert*, 3 American West 34, 38-39 (1966).

owned by the California Development Company and in 1900, the Mexican company held title to approximately 100,000 acres of land in Baja, California. The California Development Company and its wholly-owned Mexican company entered into a contract on December 28, 1900 wherein the California Development Company seeded 7,240,000 acre feet of water annually to the Mexican company, to permit the latter to irrigate Baja California lands in consideration for the Mexican company's promise to deliver water at a re-entry point on the international border.[62]

To promote the development of the land in the Imperial Valley, a colonization agency called the Imperial Land Company was incorporated in 1900 by the California Development Company. This corporation contracted to make all necessary land surveys, to do all advertising and colonizing, and to sell all water stock. In return for its services, it was to receive a percentage of the gross sales of water stock and was allowed to acquire and own townsites in the Valley. Through the use of government land scrip, the agency obtained immediate ownership in fee simple of tracts of land in various parts of the Valley which it subdivided into townsites.[63]

With the exception of land granted to the state for educational purposes (about 26,000 acres) and land granted to Southern Pacific Railroad (about 83,000 acres) before 1900, all other land in the Imperial Valley was public domain. While the irrigation canal was being constructed through Mexico, a large number of individuals, some of whom were employed by the construction company, anticipated the arrival of water by filing entries on government land.

[62] 2 CR 7.

[63] Watkins, *supra*, at 310; Poli, *Land Ownership and Operating Tenure in Imperial Valley, California*, 12-13 (U.S. Department of Agriculture, Berkeley, Calif. 1942), hereafter "Poli".

Some of the applications were received by the United States Land Office as early as March 1900. Most of the land in the Valley was subsequently acquired by filing entries with the land office, principally under provisions of the Homestead and Desert Land Acts and the land was obtained largely in tracts of 80, 160 and 320 acres. Some land was also acquired through the use of government land scrip. Much of the railroad and school land previously granted was subdivided and sold during a period of agricultural development. In this way, acquisition of land took place quite rapidly and by the end of the first year it is estimated that entries had been filed on some 78,000 acres of farm land.[64]

Before 1901, the Imperial Valley was virtually an uninhabited desert. The desert basin, then referred to as the "Salton Sink," had been visited by Spanish explorers as early as the 16th century and by members of several military expeditions who had crossed the desert region during the early part of the 19th century. In the 1850s, a stage line which traversed the southern part of the desert from the Pacific Coast to Yuma, Arizona, and later extended to St. Louis, Missouri, was established and its operation continued until the completion of the Southern Pacific Railroad Co.'s line from Yuma to Los Angeles. The stage and railroad stations which were established at various points in the desert constituted one of the earliest forms of settlement.[65]

In July 1901, water was diverted from the River through Hanlon's Heading, a temporary diversion point located a few hundred feet north of the Mexican border into the Imperial Valley via the Alamo Canal which followed the bed of the Alamo River immediately south of the bor-

[64]Poli at 13.

[65]*Id.* at 12.

der.[66] George T. Chaffey, an engineer who was a well known irrigator of the time, was retained by Rockwood to construct the diversion facilities. He soon discovered that the California Development Company did not have the promised option on the diversion point at Hanlon's Heading, that it did not have the represented right of way through Mexico, that it was bankrupt and in jeopardy of losing its charter and that it was obligated to accept $350,000 worth of land scrip at par which was about 10 times the market value.[67] Since the California Development Company had no money to pay for construction, Chaffey raised his own money and proceeded to develop the canal route through Mexico to bring water to the Imperial Valley. He sold his interest back to the California Development Company in 1905 as the population of the Valley began to grow.[68]

From the very beginning of the development of the Imperial Valley, there was uncertainty over the continued supply of irrigation water from the Colorado River. It was recognized that federal aid would require application of the reclamation law and its anti-monopoly and anti-speculation provisions.

As a "navigable stream", U.S.Const. art. 1, § 8, the Colorado River was subject to federal regulation. There was considerable doubt as to the right of the California Development Company to make diversions from the River and it became difficult for the California Development Company to raise capital. Efforts to have Congress declare the Colorado River "non-navigable" and thus beyond federal jurisdiction were not successful.[69] During

[66]2 CR 12.

[67]Caughey, *California*, 483 (1940), hereafter "Caughey".

[68]Watkins, *supra* at 310; Caughey, *supra* at 484.

[69]*Water, Land and Environment, supra*, 13 National Resources J. at 5; H.R. 13627, 58th Cong., 2d Sess. (1904).

the hearings on the proposed legislation, one witness testified:

> The bankers tell me, "You get Congress to simply declare that stream is not navigable, and then you can have all the money you want."[70]

A proposal was shortly thereafter submitted requesting the government to purchase the property and water rights of the California Development Company. 2 CR 13. In a report by the Director of the Geological survey of January 4, 1905, it was noted that the Department of Agriculture had made unfavorable reports "concerning the agricultural possibilities of these lands on account of their conditions and the present desperate situation of many of their inhabitants". 33 L.D. 391, 401, Pl.Ex. 73.

> The lands for the most part have now passed into the hands of individuals in relatively large tracts—upwards of 320 acres or even more, and many of the owners do not live in the valley, *while the reclamation act if applied to this district would limit the holdings to 160 acres and require residence in the vicinity. Ibid.* (Emphasis supplied).

Even though Rockwood established a claim to 10,000 cubic feet of water per second in 1899, the United States government refused to approve his diversions from the river in 1904. When he filed for his diversions, he overlooked the fact that the government of the United States, as well as that of Mexico, considered the Colorado to be a navigable stream and permission to divert water had to be obtained from the Department of War and he had neglected to do so. In 1903, the Reclamation Service announced that the California Development Company's diversions were illegal.[71]

[70] *Water, Land and Environment, supra,* 13 Natural Resources J. at 5, citing *Hearings Before House Committee on Irrigation of Arid Lands,* H.R. Doc. No. 13627, 58th Cong., 2d Sess. 60 (1904).

[71] Hundley, *Water and the West* 24 (1975), hereafter "Hundley".

Disaster finally struck in 1905. Because of silt clogging at Hanlon's Heading, engineers with the California Development Company opened a new and dangerous intake and at the next high water the River broke through and began to pour all of its water into the Imperial Valley. Salton Sink changed into the Salton Sea, the Southern Pacific Railroad was forced to move its tracks and the Imperial Valley was threatened with complete inundation. The California Development Company's resources were entirely inadequate for damming a river 25,000 feet wide and 30 feet deep. In June, 1905 the Company transferred its assets and the responsibility of stopping the flood to the Southern Pacific. The railroad engineers made two aborted attempts later in the summer of 1905 and early in 1906 constructed a quarter million dollar dam which was washed out by the first summer flood. Appeals to President Roosevelt were fruitless because the actual break was below the border in Mexico. The President later characterized the California Development Company's diversion efforts in Mexico as "criminal negligence". In the winter of 1906-07 the railroad tried again and after a heroic 52-day drive, involving, 6,000 car loads of rock and gravel and 12,000 piles and costing $1,600,000 the railroad finally closed the break and saved the Imperial Valley.[72]

In 1907, the California Development Company was bankrupted by the destruction and inundation of its diversion system and a Receiver was appointed. The position of the Valley, located a few hundred feet below the level of the River, denied its residents complete ease of mind until 30 years later when Boulder Dam brought the River under control.[72a]

[72] Caughey, *supra,* at 484; California Water Atlas at 39; S. Doc. No. 212, 59th Cong., 2d Sess. 5-6 (1907).

[72a] 2 CR 14.

Congress authorized several appropriations for flood control following the 1905 flood, including $1 million appropriated in 1910 for the purpose of protecting the lands and property in the Imperial Valley and elsewhere along the Colorado River, ". . . against injury or destruction by reason of the changes in the channels of the Colorado River . . ."[73] However, the situation became untenable because of harassment by Mexican officials. In 1915 Congress ended its aid and refused to spend more money, thus forcing Valley residents to shoulder the burden of flood control in Mexico.[74]

In 1911 and 1914, revolutionary conditions in Mexico threatened to disrupt the water supply. At one point in 1914, following the American invasion of Vera Cruz, about 600 Mexican soldiers, armed with machine guns, camped just across the border. In response to the Valley's frantic calls for help, the California Governor sent a battalion of the State militia into the area and it was quickly joined by a volunteer calvary troop of local residents. Valley settlers were prepared to invade Mexico to protect their water supply.[75]

Other unsettling conditions in Mexico also had disconcerting effects. Dead horses and mules were often found in the canal as were bodies of the victims of the revolution. Since Valley residents took most of their household water from the canal, they were understandably upset. In addition, they were alarmed by Mexico's refusal to play a decisive role in helping to check the flood threat below the border.[75a]

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[73]Act of June 25, 1910, 36 Stat. 883.

[74]Hundley, *supra*, at 31.

[75]*Id.* at 30.

[75a]*Id.* at 30-31.

Farmers in the Imperial Valley watched the cost of protective work increase from $100,000 in 1915 to nearly a million dollars in 1916. The expense hovered around $500,000 during the next four years. At the same time, perhaps as much as 30 to 40 percent of the water was lost through seepage and evaporation in Mexico where the Canal's poorly defined banks merged with nearby sloughs and swampy areas.[76] Assessments for the cost of strengthening and extending levees made necessary by the increase of silt, which raised the bed of the river and posed the threat of a major flood, increased from seventy cents for each one hundred dollars of assessed valuation in 1915 to three dollars and twenty-five cents in 1918, nearly a five fold increase in three years.[77]

Mexico refused to share in the cost of the levees below the border even though the levees protected Mexican as well as American land. The Mexicans also imposed duties on equipment, rock and animals used in protective work south of the border. In addition, plans and specifications for improvements had to be cleared with officials in Mexico City, which led to costly delays and saddled the Valley with two masters—California's State Engineer and a Mexican official—who often disagreed how Valley engineers should proceed.[78]

By the latter part of the decade of 1910-1920, it became obvious that private irrigation efforts were of limited effectiveness and Imperial Valley residents recognized their

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[76]*Id.* at 31-32.

[77]*Id.* at 32.

[78]*Id.* at 32. Although the Colorado River Land Company, an American syndicate, owned 840,000 acres in Mexico, Imperial Valley farmers were incensed because that land was leased piecemeal to Mexican, Japanese and Chinese farmers. Farmers in the Imperial Valley accused the Colorado River Land Company of giving to "Japs and Chinamen" water which properly belonged to "red-blooded, free Americans". *Id.* at 33.

inability to cope with their problems in controlling and using the Colorado River. They turned to Congress for complete relief. In 1916, the interests of the California Development Company, then in the hands of the Southern Pacific Company by foreclosure, passed to the Imperial Irrigation District.[79] On February 16, 1918, the government and the Imperial Irrigation District entered into a contract calling for a feasibility study on the District's proposal for the construction of an All-American canal to connect the arid lands in the Imperial Valley with Laguna Dam.[80]

In the 1920's Imperial Valley interests continued their quest for federal aid with increasing intensity, ultimately resulting in passage of the Boulder Canyon Project Act on December 21, 1928. *Arizona v. California*, 373 U.S. 546, 552-53 (1963). Federal aid under the reclamation program was inevitable. Illustrative of the position of the District when it was urging Congress to build Boulder Dam and the All-American Canal, is the statement of Charles Childers, its attorney:

> We are in desperate need of flood protection today, and have been for years. Imperial Valley stands in a position to be destroyed at any time, and has been in that position for years.
>
> * * *
>
> In addition, the flood problem on the Colorado, as you so well know, involves a silt problem and even the construction of a small dam, one where the gates must be kept open, does not solve our flood problem down below. It must be such a dam as will now and forever retain that great quantity of silt and release substantially clear water, that will finally solve our problem . . . California finds itself in the position of desperate need. The water that was appropriated away back yonder is being used today in other states, and because of that condition *we are finding ourselves faced annually with the specter of a great drought. We are in desperate need of stored water. Hearings on S. 728 and S. 1274* Before Senate Committee on Irrigation and Reclamation, 70th Cong., 1st Sess. 326-27 (1928). (Emphasis supplied)

[79] 2 CR 14.

[80] *Ibid.*

Prior to completion of the high dam at Black Canyon in 1935 and the All-American Canal in 1940, privately financed irrigation efforts proved totally unsatisfactory. The foregoing summary of the Valley's problems only touched the surface. The record shows that the Imperial Valley was, in the words of the Fact Finders, one of "many private projects which [was] in trouble" and "needed a better water supply . . . and . . . there were many cogent reasons why the service should look with favor on a policy which would rescue [this] enterprise[s] from threatened disaster".[81]

a. Landowners' Benefits From the Regulation of the Colorado River.

The landowners claim that they were "victims of any land speculation which may have occurred in the 1930's and 1940's." L.Br. 20. If, in fact, some of the landowners trace their roots back to the colonizers of 1901, they would hardly have suffered financially from the project. It may be well to examine how the excess landowners have been victimized by the Project Act.

John R. Riter, a professional engineer employed by the Bureau of Reclamation, testified concerning the regulated flow of the Colorado River resulting from the project.[82]

[81] *Supra*, note 50.

[82] The primary benefit of a reclamation project is a regulated water supply. *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1144.

The flow of the River "is characterized as erratic. It varies in rate of discharge considerably from year to year, as well as within the year".[83] In the 33-year period from 1902 to 1934, before construction of Lake Mead, there were annual flows ranging from about 22 million acre-feet in 1909 to less than 3 million acre-feet in 1934. The average flow for this period was about 15-million acre feet.[84] The River was "a heavy, heavy carrier of silt" before construction of the project.[85]

While the River was in its natural state, there was an inadequate flow to meet the irrigation needs of the District in times of drought. In times of flood there was a threat that the River would shift its course, making it difficult to maintain a heading for the District canal. There was also the threat that its course would shift and flow into the Imperial Valley, as occurred in 1905. The large volumes of sediments carried by the River aggravated the problem.[86]

Prior to construction of Hoover Dam, the total estimated shortage in the months of June to November in 1934 was nearly 800,000 acre feet in the District.[87] It was estimated that had there been no regulation of the River at Lake Mead, there would have been a shortage of approximately 560,000 acre-feet in the months of March, July, August, September and October, 1956.[88] Had it not been for the project, there would have been significant water shortages in at least one month in twenty-two of the years between 1935 to 1968, and in nine of those years there would have been significant shortages in at least two months. In seven of those years, there would have been significant shortage

[83]4 Tr. 429:17-22.
[84]*Id.*, 429:23-430:3.
[85]*Id.*, 430:9-12.
[86]*Id.*, 430:23-431:14.
[87]*Id.*, 433:20-435:13; Pl. Ex. 2.
[88]4 Tr. 435:14-436:18; Pl. Ex. 3.

in at least three months.[89] If there had not been a project, shortages would have been more frequent in recent years because of the decreased run-off.[90] Although there have been major floods on the Colorado River since Hoover Dam went into operation in 1935, there have been no adverse effects in the District.[91]

In addition to the regulated flow of the River and the removal of the ever-present threat of floods, the economic benefits to the landowners of the Imperial Valley have been phenomenal. Edmund Barbour, an economist with the Bureau of Reclamation, testified both to the losses incurred prior to completion of Hoover Dam and the benefits acquired thereafter. In 1934, there was a drought and agricultural losses approximated $10 million dollars. This was a 25 per cent loss in the value of agricultural commodities due to the water shortage that year.[92] Had there not been for the project, there would have been a loss of the total agricultural value of commodities produced in the District of $95 million dollars because of water shortages in 1940, 1944, 1948, 1956, 1960, 1963 and 1966.[93]

The value of agricultural commodities prior to 1940 varied between $20 and $40 million dollars. Thereafter, the values gradually increased to $140 million dollars between 1952 and 1958 and then moved up to approximately $220 million dollars at the time of trial in 1970.[94] The average crop value increased from $107.00 per acre in 1942 by approximately three and a half times, to $346.00 per acre in 1967.[95] Other direct financial benefits to the landowners of the Valley were described in a report to the House Com-

[89]4 Tr. 437:12-438:5; Pl. Ex. 4.
[90]4 Tr. 439:22-440:14.
[91]*Id.*, 441:11-442:22.
[92]*Id.*, 454-10-16.
[93]*Id.*, 454:23-455:3.
[94]*Id.*, 456:2-18; Pl. Ex. 7.
[95]*Id.*, 457:23-458:8.

mittee on Interior and Insular Affairs in 1956, showing the increases in productivity, which were direct contributions of the project, and were summarized in these terms:

> With an assured water supply, increase in production of farm crops in the Imperial Valley has been phenomenal. Field crops valued at only $5,321,000.00 in 1940 had increased to $65 million dollars by 1954, or by 1,122%. Vegetable and truck crop values increased from less than $13 million dollars to $34 million dollars, or by 167%. Production of livestock and livestock products was up by 274%, all from an agricultural area which had expanded by only 9% in 14 years, reflecting a significant and very substantial increase in actual per acre productivity. Crop values per cultivated acre increased correspondingly from an average of $53.50 in 1940 to $200.00 in 1954.[96]

In addition, the dependability of the water supply "has also resulted in a more constant acreage devoted to intensive high risk crops which could not be undertaken without a dependable water supply".[97] The report went on to state:

> The deep, rich soils of the Imperial and Coachella Valleys, combined with the favorable geographic location and a dependable water supply provided by the All-American Canal system, make the area one of the richest agricultural empires in existence. Not only are the farmers able to produce two or three crops per year from the same land, but the yield obtained from many of the crops grown are considerably in excess of the average yield for the United States. For instance, the average flax yield per acre in Imperial Valley is 33.8 bushels per acre, which is approximately four

[96] *The Contribution of the All-American Canal System, Boulder Canyon Project, to the Economic Development of the Imperial and Coachella Valleys, Calif., and to the Nation,* Report by Bureau of Reclamation, United States Department of the Interior for the Use of the House Committee on Interior and Insular Affairs 13 (Comm. Print No. 13, 1956), Pl. Ex. 34.

[97] *Id.* at 4.

> times the United States' average of 8.8 bushels per acre. In fact, the world's record yield of flax of some 70 bushels per acre has been established in the Imperial Valley.[98]

With regard to general economic benefits from irrigation, Mr. Barber testified that agricultural values have increased two and a half to three times since completion of the project.[99] The landowners of the District saved $170 million which would have been incurred in agricultural losses relating to twenty-one years of serious water shortages between 1934 and 1968.[100] Silt retention benefits would average $1 million a year in savings to the District and the landowners.[101]

b. Landowners' Benefits From the Interest Free Prepayment of Construction Costs.

The District Brief reports ". . . the payment of one-half of the construction charges [have been made] by the present landowners or their predecessors". Dist. Br. 74. The record is uncontradicted that *all* construction costs have been paid from the sale of electrical energy generated by hydroelectric facilities on the All American Canal. Power operations will provide revenues to take care of the balance of the repayment requirements on the original $25 million interest free obligation of the District.[102] The landowners have paid nothing. This misstatement by the District is curious. While it is true that all of the 75,000 residents of the Valley spent $15 million to construct the hydroelectrical facilities on the All-American Canal,[103] the

[98] *Id.* at 7.

[99] 4 Tr. 476:17-477:1.

[100] *Id.*, 477:10-13.

[101] *Id.*, 477:25-478:2.

[102] *Id.*, 477:17-20; 322 F.Supp. at 14.

[103] 322 F.Supp. at 12.

Bureau of Reclamation spent $1,360,000.00 for the power house structure foundations for the power drops.[104] During the period of construction of the Canal, between 1935 and 1938, there was an unfavorable bond market and the Public Works Administration provided grants of over $2 million and loans of $2½ million for the power drops.[105]

The 1938 Annual Report of the District stated:

> You now own a modern, efficient power service representing, on completion, an investment of $5,360,000.00, more than $2 million of which was a direct gift to you from the Federal government.[106]

Another subsidy is the interest-free loan on the $25 million dollars apportioned to the District for repayment of the cost of constructing the All-American Canal. Through 1970, the interest savings on the repayment contract for the All-American Canal was $37,000,997.00 at 3% interest.[107] The total interest savings at 3% over the pay-off period would amount to $84 million.[108] If interest of 5% was charged, which was the rate of interest for available financing prior to the project, the savings would amount to $91,695,000.00 through 1970. Over the entire contract period, it would amount to $303 million.[109]

The financial benefits to the landowners of the District as a result of the storage and regulation benefits were determined, on a pro rata basis, based upon the cost of constructing Hoover Dam and the Reservoir in Lake Mead, to be $25 million. If that sum was placed in a fund with a then going interest rate of 3%, that would have accumulated to $70 million through 1970. Over the entire

[104] 4 Tr. 458:23-459:11.
[105] *Id.*, 459:23-460:5.
[106] *Id.*, 460:6-10.
[107] *Id.*, 468:13-16.
[108] *Id.*, 468:23-25.
[109] *Id.*, 470:2-17.

pay-off period for the All-American Canal facilities, the value of that accumulation would come to $175 million. In 1970, the 5% figure would have been approximately $138 million, and over the pay-off period it would have been $467 million.[110]

Finally, to put frosting on the cake, it is anticipated that none of the construction costs will actually be passed on to the landowners of the District. Their benefits would therefore include both savings of principal and interest, and at 3% over the pay-off period this would amount to $115 million, and at 5%, over $400 million, using $440,000 as the average service area, or from $260.00 to $930.00 per acre. At 5%, the Federal investment results in a savings in principal and interest of $467 million throughout the pay-off period. Averaged over the 440,000 acres of irrigated land, it would amount to $330.00 per acre if the investment is valued at 3% and $1,060.00 per acre if averaged at 5%.[111]

Landowners testified that there was no way they could conduct their farming operations in the Imperial Valley without irrigation water, and they knew of no use for their property if they did not farm it.[112] Landowner Robert C. Brown emphasized the extent to which land in the Imperial Valley was unsuitable for anything but farming. He was asked what use he could make of it if he didn't receive irrigation water:

> Well, unless there's a market for rattlesnakes and rabbits, that's about all.[113] 4 Tr. 351:15-16

So much for the victimization of the excess landowners in the Imperial Valley.

[110] *Id.*, 476:7-16.
[111] *Id.*, 476:17-478:24.
[112] *Id.*, 388:22-25; 388:6-8; 423:23-25.
[113] *Id.*, 351:15-16.

6. ADMINISTRATIVE PRACTICE.

Petitioners' recitation of the administrative practice under the Project Act is highly selective and incomplete. The relevant, longstanding practice of the Department of Interior in administering the excess land law throughout the period when the Project Act was considered by Congress and when the All American Canal contract was being negotiated and executed, is completely omitted. Doubts concerning the legal sufficiency of the practice of nonenforcement and its outright rejection in 1958 by the Solicitor General of the United States is nowhere mentioned. Con. App. 260a, 71 I.D. 554. The government's official change in the prevailing practice represented by the opinion of Solicitor Barry is barely mentioned in passing. The last mentioned legal opinions are not shown on the District's "Summary of Administrative Practice" submitted with its Appendix, Dist. App. 247a.

As pointed out earlier in the discussion of the background of the Reclamation Act, lands in private ownership within reclamation projects have long been subject to the anti-monopoly provisions of the reclamation law. Edward Weinberg, a career attorney in the Department of Interior for twenty-five years until his appointment by the President as Solicitor in 1968, had spent his entire professional career intimately associated with the reclamation laws. 2 Tr. 86:15-23. He testified that the practice in the earliest days of reclamation was to apply the acreage limitation to privately owned lands even where such lands had a "vested right" or pre-project right to the use of water from another source. So long as the project was intended to provide water service to those lands, the acreage limitation applied. *Id.*, 95:2-96:18, 105:4-106:12. This testimony was supported by a Solicitor's Opinion, approved by the First Assistant Secretary of the Department of Interior on June 14, 1927. That opinion concerned the question of the application of the acreage limitation of Section 46 to "old lands" having a partial water right and for which only a supplemental water right was to be attained by the new irrigation project. It rejected any possible distinction between "old lands" having a partial water right and for which a supplemental water right was to be made available, and "new lands", i.e., those then without any water right and for which a complete water right was to be secured from the reservoir to be constructed by the government. In relevant part, the Opinion provided:

> In a memorandum of May 12, 1927, the Acting Commissioner calls attention to the practice followed generally in relation to other projects wherein the old lands were treated as subject to the usual provisions of the reclamation act, and that any distinction which might be made in this case would be a radical departure therefrom, and would not be justified unless and until Congress clearly authorizes a different course.
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> . . . there is nothing in the legislation which expressly authorizes a departure from the practice generally followed in similar cases. The references in the act of January 12, 1927, to the lands for which only a supplemental water supply is to be furnished, leaves little room to doubt that Congress contemplated that all land of that character to which water would be supplied should become a part of this unit and it is my opinion that contracts made with the owners of such lands should require adjustments of acreage as required by the act of May 25, 1926 . . . Sol. Op. M-22401, Pl. Ex. 14, pp. 11-13; 2 Tr. 97:11-100:24.

The government also introduced the memorandum referred to in the Opinion dated May 12, 1927 prepared by Porter W. Dent, Acting Commissioner of Reclamation. Mr. Dent expressed the same views on the prevailing practice as the Solicitor in 1927 and by Mr. Weinberg at trial.

Pl. Ex. 80, 3 Tr. 164:1-20. A government survey completed on December 5, 1968 was received in evidence and its contents, along with other documents was explained in detail by Mr. Weinberg to further establish the long-standing administrative practice from 1902 to the present recognizing no distinction between "old lands" and "new lands" in the application of the anti-monopoly provisions of reclamation law. Pl. Exs. 16, 17, 18, 20, 22, 23, 24, 25, 30, 31, 35, 36, 32, 33, 20, 37, 78, 79; 2 Tr. 117:8-128:20.

With respect to the Project Act and the Imperial Valley, on November 4, 1930, Northcutt Ely, Executive Assistant to Secretary Wilbur, was asked for his opinion on whether or not the "[R]eclamation laws restrict individual holdings to 160 acres. How does this affect the District." His response was:

> The Reclamation laws' limitation of 160 acres to a particular owner represents a serious problem, in view of the fact that this, being an existing project, includes many farms with larger area. I see nothing to do but enforce it unless the Imperial Irrigation District can get new legislation. In any event, enforcement of this requirement would undoubtedly have a salutary effect on suspected speculative activities in that locality. Pl.Ex. 58, Con.App. 223a, 71 I.D. 528.

The All-American Canal contract was signed by Secretary Wilbur on December 1, 1932 and by the District on January 16, 1933. LX-BC, p. 14. At that time, the 1927 Solicitor's Opinion (Pl. Ex. 14), constituting the official action and interpretation of the Department of the Interior on "vested rights", had not been revoked, and still has not been revoked. 2 Tr. 96:102:3-10.

After the All-American Canal Contract was signed by both parties, on February 4, 1933, Richard J. Coffey, District Counsel of the Bureau in Los Angeles, reported to Mr. Dent, by then the Assistant Commissioner, that Charles

Childers, attorney for the Imperial Irrigation District, had requested a Solicitor's opinion that the acreage limitation did not apply to the District, but did not want an opinion if the ruling was that the law did apply:

> Childers is very anxious to get a ruling on the point from the Solicitor, prior to the hearing of the confirmation proceedings, and the Malan suit, both of which are to be called up for hearing on March 6th next; provided, that such ruling would be that the 160-acre limitation did not apply. He doesn't want any formal ruling, of course, if the Solicitor were to hold that the limitation applies so far as Imperial Irrigation District is concerned. Con. App. 221a-222a, 71 I.D. 527.

On February 7, 1933, Mr. Dent prepared a memorandum for Northcutt Ely voicing a new opinion that the "vested water right[s]" in the Imperial Valley were entitled to recognition without regard to the acreage limitation. Con. App. 219a, 71 I.D. 525. On February 16, 1933, Mr. Ely, too, changed his mind and stated that he agreed with the 1933 views of Mr. Dent, rather than his own opinion previously expressed in 1930 and the prevailing practice of the Department of Interior. Con. App. 223a, 71 I.D. 528.

There obviously was not enough time to perform very much research or investigation before Secretary Wilbur left office. On February 24, 1933, Secretary Wilbur, without the assistance of his Solicitor, signed a letter to the District adopting the 1933 views of Mr. Dent and Mr. Ely and starting the practice of nonenforcement relied upon by petitioners. Con. App. 224a, 71 I.D. 529.

It should be noted that the Wilbur letter was not a Solicitor's opinion or formal ruling of any kind, and it did not take attorney Childers long to recognize the obvious errors in the Wilbur letter. Less than one week later, he was "apprehensive" because the Secretary did not even

refer to the most recent enactment of the acreage limitation in § 46 of the 1926 Omnibus Adjustment Act. Con. App. 228a, 71 I.D. 531. Mr. Dent then found it necessary to try to reassure Mr. Childers that Secretary Wilbur's failure to mention § 46 was not significant. *Ibid.*

Presumably, Secretary Wilbur and members of his staff would have reviewed the legislative history and devoted some time and attention to the "careful consideration" the letter said was given to the question of the 160 acre limitation before reaching the "view . . . that this limitation does not apply to land now cultivated and having a present water right." Con. App. 225a, 71 I.D. at 530. Yet the files of the Department of Interior revealed no records of any study or investigation by the Secretary or his Solicitor or staff.

Mr. Weinberg testified that prior to the preparation of the Barry opinion, the files of the Department of Interior were examined for records of negotiations bearing on the question when Secretary Wilbur gave "careful consideration" to the 160 acre question "early in the negotiations", when the decision was made, and precisely what the decision was at the time it was determined that the reclamation law did not apply to Imperial Valley. 2 Tr. 103:1-11. Searches were made of the records in the Interior Department building in Washington, D.C., the Solicitor's files, files of the Bureau of Reclamation, National Archives in Washington, federal records centers throughout the country where old Reclamation and Interior Department files were kept, files in the office of the Chief Engineer in Denver, Office of the Regional Solicitor in Los Angeles and the Regional Director at Boulder City. These searches uncovered nothing but the memorandum from Northcutt Ely of November 4, 1930, which was consistent with long-standing administrative practice but in direct conflict with

the Wilbur letter. Pl. Ex. 58, 2 Tr. 102:22-104:20; Con. App. 196a, n.25, 71 I.D. 509, n.25.

There were doubts within the Department of the Interior concerning the validity of the Wilbur letter shortly after water deliveries through the All-American Canal began in the early 1940's. Mr. Weinberg testified that ". . . it was generally common knowledge within the Bureau of Reclamation and the Department that the Chief Counsel of the Bureau of Reclamation had serious reservations about the Wilbur letter. This was the common subject of discussion. . . ." 2 Tr. 130:23-131:1.

On November 21, 1944, Secretary Ickes referred to the Wilbur letter and stated:

> "The extent of that ruling, its basis, and its governing effect are not clear." Pl.Ex. 64, 2 Tr. 133:8-134:16.

Shortly thereafter, the first occasion arose when the Wilbur letter and its substantive conclusion was actually subjected to legal analysis.[113a]

On May 31, 1945, Solicitor Harper issued his opinion, approved by Secretary Ickes, determining that Section 14 of the Project Act requires the application of the acreage limitation to the Coachella Valley. Sol.Op. M-33902, Con. App. 230a, 71 I.D. 533. Solicitor Harper considered and rejected the reasoning of the Wilbur letter. He concluded

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[113a]Landowners refer to an internal departmental document by B. P. King as an "exhaustive study" and a "definitive study" of the excess land laws in 1941 L.Br. 35, 40. This report was prepared by an associate attorney in the Billings, Montana, Field Office, was not published as a Departmental Opinion, and there is nothing of record to show that its legal analysis was ever officially sanctioned by the Department of the Interior. At the time his "report" was prepared, Mr. King had been a member of the Bar approximately 4 years. I Martindale-Hubbel Law Directory 287 (1957). Solicitor General Rankin reported to the Special Master in the *Arizona v. California* litigation that this report "is utterly devoid of logic and of any other basis for support." Con.App. 262a, 71 I.D. 555.

that it completely disregarded all other excess land provisions except Section 5 of the 1902 Act, and was contrary to the legislative history of the Project Act. Con. App. 249a-252a, 71 I.D. 546-547. Solicitor Harper appraised the Wilbur letter in these terms:

> . . . an examination of the files reveals that the letter of the former Secretary was written at the request of counsel of the Imperial District who wanted a ruling on the application of the excess land provision "provided, that such ruling would be that the 160-acre limitation did not apply." Purposely, the letter of Secretary Wilbur never took the form of a formal decision. It was written solely for the purpose of giving partisan help to the Imperial Water District, as the delay of the final confirmation of the contract held up the construction of the All-American Canal. Besides, the time of the Hoover Administration was near its close. In less than ten days after the date of Secretary Wilbur's letter, February 24, 1933, President Roosevelt was inaugurated. Con.App. 252a, 71 I.D. 547-548.

Although extremely critical of the Wilbur letter, Solicitor Harper did not specifically overrule it, but concluded that it was simply intended to apply to lands in the Imperial Valley and not those in the Coachella Valley. Con. App. 252(a), 71 I.D. 547.

From this point forward, the Department of Interior followed inconsistent administrative interpretations concerning the application of the 160-acre limitation of reclamation law under the Project Act in the Imperial and Coachella Valleys of California. The statute does not distinguish between either Valley, and, in fact, both Valleys are treated in identical fashion in the only part of the statute where they are mentioned by name. Both Valleys receive water through the All-American Canal and § 1 of the Project provides, "No charge shall be made for water or

for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; . . ." 35 Stat. 1057, 43 U.S.C. § 617. Even Porter W. Dent, upon whose expertise petitioners rely, considered the two Valleys to have indentical status under the Project Act, because the "special conditions in the Imperial and Coachella Valleys were known to Congress." Con.App 228a, 71 I.D. 532.

The next occasion when the application of the 160-acre limitation in the Imperial Valley arose was in 1958 during the proceedings before the special master appointed by this Court in the *Arizona v. California* litigation. The special master requested memoranda on the question, and the Solicitor General then sought the views of the Solicitor of the Department of the Interior, Elmer F. Bennett. Solicitor Bennett's reply, as reported by petitioners, was that it was no longer realistic and practicable to enforce the law simply because it had not previously been enforced. Con.App. 255a, 71 I.D. 550. But petitioners fail to mention that the Bennett view was rejected. Solicitor General Rankin, while taking the position that non-compliance with the acreage limitation was not relevant to the issues before the special master, stated his conclusion that the acreage limitation did indeed apply to privately owned lands in the Imperial Valley receiving water through the All-American Canal. Con.App. 261a-262a, 71 I.D. 555. Solicitor General Rankin stated:

> Briefly, it may be stated that for the reasons stated in Solicitor Harper's opinion as well as for others, no conclusion seems permissible, other than that the limitations of the Reclamation Law upon the quantity of privately owned lands which might receive irrigation water under the All-American Canal, are applicable in the Imperial Valley just as are the similar limitations relating to public lands open for entry within the District. . . . Clearly, the All-American

Canal is a reclamation project (36 Opp.Atty.Gen. 121, 130, 138, Dec. 26, 1920), subject to all the provisions of 'Reclamation Law,' as defined in section 12 of the Boulder Cannon Project Act . . . except as such provisions are by the Project Act made inapplicable. . . . It is at best no more logical to argue, as the California defendants have, that the omission to include in the Project Act an express limitation with respect to lands in private ownership indicates a Congressional intent that no such limitation should apply than it is to argue that the express provision was deleted because it was thought section 14 was entirely adequate to accomplish the purpose. The express limitation with respect to public lands contained in section 9 is not inconsistent with such an assumption. The express provision of section 9 with respect to the opening of public lands for entry made necessary the accompanying limitation on the size of the tracts. . . . other references to the control and effect of the provisions of Reclamation Law are to be found throughout the Project Act. In addition to Secretary Wilbur's failure to consider all of the possibly applicable provisions of the various supplements to the Reclamation Act of 1902, there are other inadequacies in his analysis for the conclusion he stated. Among them are his assumption, without analysis, that 'lands now cultivated' in the District had as against the United States vested water rights, and his assumption that those lands would receive through the works constructed by the Government only 'the continued flowage of the water covered by the right * * *'

On August 7, 1961, Senator Clinton P. Anderson, Chairman of the Senate Committee on Interior and Insular Affairs wrote to Secretary Udall and asked if the Coachella and Imperial Valleys were subject to the acreage limitation provisions of reclamation law, and, if so, the status of land ownership within them. Con.App. 263a, 71 I.D. 556.

Secretary Udall responded by stating that the "continuing press of other matters has caused us to defer a current study of the Imperial situation. We hope, however, to go into it in the future, as circumstances of available staff and time permit." Con.App. 264a-266a, 71 I.D. 556, 558. Apparently the "continuing press of other matters" prevented Secretary Udall from conducting his study until April of 1964, when the Secretary, accompanied by Mr. Weinberg, appeared before the Senate Subcommittee on Irrigation and Reclamation. The hearings were concerned with the Pacific Southwest Water Plan, a proposal to import water from outside the Colorado River Basin to make up for deficiencies in the natural flow of the Colorado. Secretary Udall and Mr. Weinberg were repeatedly pressed by Senator Anderson and particularly by Senator Kuchel of California for a definitive answer concerning the application of the acreage limitation under the Boulder Canyon Project Act. 3 Tr. 158:21-159:13; *Hearings on S. 1658* Before Subcom. on Irrig. and Reclamation of Comm. on Inter. and Insular Affairs, 88th Cong., 2d Sess., Part 2, 349-351 (1964). It was then decided that the time to conduct a definitive study of the question at issue in this case had arrived. This process was explained by Mr. Weinberg:

> The senators who were doing the interrogating, indicated they felt it was a very important matter, that Congress was entitled to know the answer. The Secretary, the Solicitor, and I, thereupon conferred and we concluded that this skeleton could no longer rattle around in the closet. The time had come when we had to take it out, fairly examine it, and set the matter to rest, one way or another, in fairness to Imperial. If a full examination revealed that the excess land laws, in our judgment, were not applicable, Imperial, we thought, felt as entitled to such a determination. On the other hand, if that were not the situation, it was our conclusion that the matter should be brought into

the open, laid on the table, and disposed of. 3 Tr. 159:1-13.

On December 31, 1964, Solicitor Barry issued a formal opinion after eight months of research and preparation. Sol.Op. M-36675, Con.App. 182a, 71 I.D. 496; 3 Tr. 210: 3-22. It concluded:

> The Boulder Canyon Project Act by its plain terms incorporates those provisions of law which impose acreage limitations on lands served from federal reclamation projects. The Boulder Canyon Act works, including the All-American Canal, Imperial Dam and appurtenant structures, are federal reclamation facilities. Nothing in the history of the Project Act and nothing in the legislative history of reclamation law modifies what has been said by Congress as its plain intent.
>
> The interpretation in the Wilbur letter of the meaning of the Project Act was clearly wrong and could not effect a change in the statutes enacted by Congress.
>
> The fact that the Department has failed for over 30 years to enforce the excess land laws acreage limitations in Imperial Valley cannot legitimize a violation of public policy contrary to the spirit and the letter of the law.
>
> I have concluded, after a consideration of all issues, that . . . : Privately owned land in Imperial Irrigation District, even those assumed to have vested Colorado River water rights, are subject to the excess land laws. Con.App. 210a, 71 I.D. 518-19.[113b]

[113b]The landowners point to a challenge to the "legal sufficiency" of the Barry Opinion by Undersecretary Carver. L.Br. 17, n.17, LX-CQ. However, the uncontradicted evidence at trial was that Mr. Carver was not involved in reclamation law matters in the Department, his memorandum was actually drafted by an assistant, and, more importantly, Secretary Udall "was not impressed" with the views expressed in the memorandum, Solicitor Weinberg considered that Mr. Carver had made a "grievous error of law" in his reading of Section 46. 3 Tr. 202:1-3, 206:22-25, 207:15-17 and 251:19, 252:4.

The record shows that Wilbur letter was presented to the Secretary for signature less than ten days before he left office. In the district court, the government commented,

> The Wilbur letter must be considered for what it was, a partisan effort by a lame-duck administration to effect, by administrative interpretation, an exemption that proponents of the Project Act never dared risk seeking directly. 3 CR 148.

Only one of the personalities involved in bringing about the issuance of the Wilbur letter remains. Despite the grave charges hurled against Secretary Wilbur and his colleagues by Solicitor Harper in 1945 and by the government in this case, neither the District nor the landowners called Northcutt Ely, Secretary Wilbur's Executive Assistant, to testify and explain away the documents in the record relating to the circumstances surrounding issuance of the Wilbur letter. Since Mr. Ely negotiated the All-American Canal contract in behalf of the government (his signature appears on the contract beneath that of Secretary Wilbur, Dist. App. 212a) and thereafter became counsel to the District in this very case, respondents assume that he was available to testify by deposition or in person during the four years this case was pending in the district court. His failure to testify is a crucial factor for consideration by this Court.

The court of appeals considered the Barry Opinion to be "thorough and comprehensive" while rejecting the informal Wilbur letter's rather simplistic analysis not contained in a formal opinion." 559 F.2d at 539. The Court noted that the letter concerned itself with the sale of water-rights under § 5 of the 1902 Act, and did not purport to consider § 46 of the Omnibus Adjustment Act, which

does not speak in terms of the sale of water. Of major significance was the court's observation that the letter failed to mention most of the petitioners' contentions in this case and only considered a variation of the "present perfected rights" argument in its discussion of "vested rights."[113c]

After reviewing the practice summarized above by respondents, the Ninth Circuit declined to accord deference to "an informal opinion reached under circumstances indicating a lack of careful consideration, whose conclusions have not been consistently held to be correct by the Department of the Interior" and the Wilbur letter "does not construe ambiguous or doubtful language in the Project Act, but is a rather simplistic analysis not contained in a formal opinion purports to find an inconsistency between two different statutes. It is an interpretation made after enactment of both statutes, consequently never before Congress when the Project Act was being considered". *Id.* at 539. The inaction of the Department of the Interior based on previous inaction was not considered sufficient to be elevated into an administrative determination to which the courts should defer. *Id.* at 559. Any consideration to adherence to the Wilbur letter because its existence was brought to the attention of Congress was rejected because, for the most part, the subject to the Imperial Valley was never the focus of the congressional consideration. *Id.* at 540-41.

[113c]The term "present perfected rights" appears in Article VIII of the Colorado River Compact and § 6 of the Project Act, 45 Stat. 1061; 43 U.S.C. § 617e. Presumably, the relevant provisions of the Project Act would have been well known to Messrs. Wilbur, Dent and Ely, even though they apparently overlooked the existence of § 46.

7. THE PARTIES.

A. Landowner—Petitioners.

Landowner-petitioners John M. Bryant, et al. (hereafter "landowners") are class intervenors essentially composed of 150 partnerships and corporations who conduct most of the farming operations of more than 160 acres in the Imperial Valley.[114] As the owners of "some of the finest agricultural land in the world,'[115] they enjoy a year round, dependable supply of irrigation water from the Colorado River provided to them at no cost, for under § 1 of the Project Act, there is no charge for the use, storage or delivery of water for irrigation purposes in the Imperial and Coachella Valleys. 45 Stat. 1057; 43 U.S.C. § 617. The landowners have paid no part of the costs of constructing the All-American Canal because all repayment costs have been made from revenues derived by Imperial Irrigation District from the sale of electrical power generated by hydro-electrical facilities on the Canal. 322 F.Supp. at 14. Power revenues will be sufficient to pay the balance of the District's obligations. 4 Tr. 477:17-20.

As described *infra*, the Reclamation Act was specifically designed to create and maintain family *sized* farms with the federal water subsidy. Landowners' description of themselves as family farmers of the yeoman class finds support only in the mythical account in their brief. The reality presents a far different picture.

[114]322 F.Supp. at 12. The parties stipulated at trial that about 800 "persons" owned approximately 233,000 excess acres as of September 3, 1965. The figures in the text are more recent and specific and are derived from *The U.S. Department of the Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis*, Staff Report by the Economics, Statistics, and Cooperative Service, U.S. Dept. of Agriculture, No. ECCS-04, p. 17 (1978).

[115]595 F.2d at 528.

Landowners tell this Court that they "represent the people whose lives are threatened with harsh dislocation and devastating economic loss by the decision below". L.Br. 18. They go on to describe themselves and each member of the class they represent as an owner of "farmland on which he has invested the better part of his life's labor and the bulk of his life's savings. *Typically*, they have acquired their lands over a period of one or two decades, paying market prices which reflected whatever economic value accrued to the land from project benefits". *Ibid.* (emphasis added).

Let us take one "typical" example, landowner Stephen Elmore. Instead of being a "typical" example of the family farmer sought to be portrayed, this illustration demonstrates the extent of the total distortion of the facts and the record in the briefs of petitioners. The "thumbnail sketch" in the landowner's brief simply tells the Court that Mr. Elmore and his wife "jointly own 2,208 acres which they farm. Elmore grew up in the Valley, the son of a homesteader who began farming in the Valley in 1908. The lands owned by Elmore and his wife were acquired by them during the period 1951-1964". L.Bd. 18, n. 18. The record presents another story. Mr. Elmore acknowledged personally farming "a little over 4,200 acres. Gross acreage of a little over 4,600 acres" and owning "slightly over 2,200". 3 Tr. 354:15-19. He made two purchases of farmland in 1951, 320 acres at $46.00 per acre and 315 acres at $241.00. *Id.*, 357:13-20, 358:9-15. In 1952, he purchased 272 acres at $297.00 each. *Id.*, 358:19-359:3. In 1960 he purchased 352 acres at $952.00 and in 1964 he purchased 628 acres at $437.00 per acre. *Id.*, 359:8-22. Other sources

show that the Elmore family farms from 10,000[116] to 14,000[117] acres.[118]

The Elmore case may indeed be representative of the excess landowners in the Imperial Valley, but not in the fashion they intended to represent. The latest figures available to the U.S. Department of Agriculture are for the year 1974. They show that at that time, there were 715 farming operations in the Imperial Irrigation District averaging 716 acres per farm. Farm numbers and sizes were distributed as follows:

Land in farms	Number of Farms
Less than 50 acres	194
50 to 179 acres	141
180 to 499 acres	139
500 to 999 acres	91
1,000 to 1,999 acres	73
2,000 acres and over	77

121,892 acres were farmed by corporate owners, with an average of 1,463 acres each. Farms of all types of ownership were distributed by type of business organization as follows:

Type of Business	Number	Average Size
Sole proprietorships	505	490 acres
Partnerships	120	1,175 acres
Corporations	84	1,463 acres
Others	6	113 acres

[116] *Will the Family Farm Survive in America?* Joint Hearings Before Senate Select Comm. on Small Business and Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., Part 1A, 597 (1975).

[117] *Id.* at 601.

[118] The status of landowner John Kubler is also erroneously represented. Mr. Kubler is not a person who "now farms . . . on 680 acres owned by him." L.Br. 19. He testified that he owns 860 acres and farms an additional 1600 in "diversified farming operation . . . we grow various crops. We're not limited to field crops or just one commodity. We grow field crops, virtually all of the field crops grown in the Valley. We grow produce. We also are in the cattle business, growing pasture and owning cattle . . . averaging 3,000 head." 4 Tr. 371:10-372:3. He has 12 permanent employees, seven of whom live "on the range." *Id.*, 372:20-25.

The Department of Agriculture concluded:

> "The U.S. Department of the Interior has estimated 265,000 acres (60 percent of the irrigated acreage) in the District are excess land. It seems likely that much of the excess land is farmed by the 150 farming operations that exceed 1,000 acres in 1974 and is probably owned by the 204 partnerships and corporations shown above."[119]

A high percentage of large landholdings in the reclamation program is unique to California. For example, in the North Platte Project in Nebraska, it was reported that more than half of the ownerships were in excess by 50 acres or less and only five owners were in excess by more than 250 acres.[119a] In the Columbia Basin Project in 1973, about 97 per cent of the farms were 640 acres or less, although 3 per cent of the irrigated land was in farms averaging more than 1,000 acres, accounting for 13 per cent of the irrigated land.[119b]

Mr. Elmore acknowledged, as do all landowners in the Imperial Valley, that he could not farm his land without irrigation water from the project, for there is an average annual rainfall of less than 2 inches. 3 Tr. 363:20-23. Landowners made no effort to develop a record concerning the quality of Mr. Elmore's land and its condition at the time he purchased it. Nevertheless, it is safe to assume that his lands, like others in the Valley, are capable of high agricultural production only because of the federal water subsidy, for there is no other source of water. In addition to what must certainly be a substantial income from his agricultural production, Mr. Elmore receives

[119] *The U.S. Department of the Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis,* Staff Report by the Economics, Statistics, and Cooperatives Service, U.S. Dept. of Agriculture, No. ECCS-04, p. 17 (1978).

[119a] *Id.* at 37.

[119b] *Id.* at 43.

other subsidies from other government programs as a further direct result of the water subsidy. In 1971, for example, he received a $102,922 in payments from the government under the Agricultural Act of 1970.[120]

Although reporting that Mr. Elmore was the son of a "homesteader who began farming in the Valley in 1908", the record does not show how his attorney-father acquired his land after coming to the Valley. L.Br. 18, n.18; 3 Tr. 356:14-25. However, the District tells us:

> All of the lands in the decreed area of 424,145 acres in Imperial Valley were acquired from the United States prior to or soon after the turn of the century, by entry under the Desert Land Act, 43 U.S.C. §§ 321, *et. seq.*, or other homestead laws. 43 U.S.C. §§161 *et. seq.* All of these laws require the applicant to have lived on these desert lands for a specified period of years. The Desert Land Act required proof of acquisition of a water right under state law by bona fide prior appropriations. . . Dist. Br. 10, n.10.

Respondents do not dispute that most of the present land holdings in the Imperial Valley apparently evolved from Desert Land Act entries. Nevertheless, the implication of the District that somehow all persons acquiring land under the discredited Desert Land Act were legitimate, bona fide homesteaders is contrary to the historic facts. Professor Sax succinctly described the abuses under this Act in these terms:

> However misguided the Homestead Act was from the point of view of developing an independent western yeomanry, its provisions seem only mildly imprudent by comparison with other congressional schemes for disposing of the public domain. The Desert Land Act of 1877 permitted one, upon a small payment, to

[120] 118 Cong. Rec. E. 2230 (daily ed. March 9, 1972). The other nominal landowner parties also received substantial payments under the same program during 1971. Mr. Bryant received $57,477, Mr. Singh $30,838 and Mr. Brown $37,767. *Ibid.*

acquire up to 640 acres of arid land, provided he would irrigate it—a virtual impossibility; the Act was openly violated by the use of professional witnesses who would testify for a fee that they had "seen water upon the claim," meaning that a bucket had been emptied upon the ground in their presence. The law thus encouraged huge holding by large sheep and cattle companies. Sax, *Federal Reclamation Law,* 2 Waters and Water Rights § 110.1, p. 115 (1967)

The historian Paul W. Gates, writing for the Public Land Law Review Commission, reported that "[T]he ink was hardly dry on the Desert Land Act before complaints reached the Land Office that there were loopholes in the act that Congress should close by explanatory and more carefully drawn restrictions. One story was told about a man who hauled a can of water to his claim, poured it into a furrow, and then swore, and his friends supported him, that he had conducted water on his claim. Another person, to gain control of the lands near a stream filed an application for land in zig-zag shape with 44 corners." Gates, *History of Public Land Law Development* 639 (1968).

The trial testimony of a few individual landowners, apparently some of the few excess owners who actually live in the Imperial Valley on the land irrigated with the water subsidy, can hardly be considered "typical" and was not considered to be representative by the district court. Petitioners carefully avoided making a complete record of the development of ownership patterns. The Department of Agriculture's figures show the present extent of large scale ownership and operation of subsidized agriculture in the Imperial Valley. In addition to large scale ownership, between 45 and 50% of the irrigated farms in the District are owned by non-residents, individuals and corporations. *Yellen v. Hickel,* 352 F.Supp. 1300, 1317 (S.D.

Cal. 1971), *vacated on other grounds,* 559 F.2d 509 (9th Cir. 1977).

Large scale, absentee ownership has long characterized the Valley. In 1905, it was reported that "the lands [in the Imperial Valley] for the most part have now passed into the hands of individuals in relatively large tracts—upwards of 320 acres or even more, and many of the owners do not live in the valley. . ." 33 L.D. 391, 401. During the period 1920 to 1928, between 35 and 50% of the District's farms were owned by non-residents. *Yellen v. Hickel, supra,* 352 F.Supp. at 1317. By the late 20's, privately developed irrigation produced the effects in the Imperial Valley that Congress had anticipated and sought to avoid in the Reclamation Act. Although about a third of the population was composed almost entirely of field laborers, control of production of two principal crops—melons and lettuce—already was concentrated in the hands of 56 and 67 growers, respectively, with average acreages of 667 and 336. Taylor, *Water, Land, and Environment, Imperial Valley: Law Caught In The Winds of Politics,* 13 Natural Resources J. 1, 4 1973). By 1936, corporations owned 23% of the 430,000 acres under cultivation: about 43% of the farm land was owned by slightly less than 6% of the owners who held more than 439 acres and averaged 1200 acres each; 46% of the farmland was operated in units of 440 acres or larger, was controlled by less than 8% of the total number of farm operators and averaged about 930 acres. At the same time, about 40% of the landowners did not live in the Valley but collectively controlled 48% of the total farm acreage. *Land Ownership and Operating Tenure in Imperial Valley, California,* 1-2 (U.S. Dept. of Agriculture, March, 1942, Berkeley, Cal.)

Neither the district judge in the present case nor the district judge in the residency case made any finding as to the manner in which ownership patterns developed from

the turn of the century down through the years. The "typical" circumstances summarized by landowners are deceptive and find no support in either history or the record. Barely a handful of individual landowners testified at trial. No explanation was offered about how the better known of present day landowners such as the Irvine Co., Holly Sugar Co. and Inter Harvest, Inc.[121] fit in with landowners' "typical" settlement pattern.

B. Petitioner Imperial Irrigation District.

The Imperial Irrigation District was the original defendant in the district court. The District is a unit of state government organized to deal with water distribution (*Salyear Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 721-23 [1973]), and the conduit for the federal water subsidy between the federal government and the landowners. Instead of being neutral among the conflicting interests in the Imperial Valley, the District apparently views its role as that of an advocate for the approximately 150 farming operations in whose behalf this proceeding has been pursued.[122]

C. Petitioner State of California.

The State of California intervened as a defendant in the district court. However, all parties agreed that the reclamation law had no application to lands owned by the State in the Imperial Water Fowl Management Area, thus granting California all the relief it requested. 332 F.Supp. at 11; 595 F.2d at 524. California thus no longer has a direct interest in the subject matter of this controversy and its continued presence in the case is curious. Morever, its brief merely restates the arguments of the other petitioners on administrative practice. Accordingly, respondents shall make no direct response to California's brief.

[121] 118 Cong. Rec. E 2231 (daily ed. March 9, 1972).

[122] In his summation at trial, counsel for the District stated, ". . . the contract does not contain the excess land limitation travesty." 5 Tr. 599:19.

D. Respondents.

Respondents are 123 residents of the Imperial Valley who do not own farmland in the Valley or anywhere else. They consist of a physician, a farm labor contractor and 121 agricultural workers. Each wants to purchase the "excess lands" which must be sold at below market prices under the recordable contract mandated by § 46 so that they may engage in farming with the water subsidy.

8. PROCEEDINGS IN THE DISTRICT COURT AND RESPONDENT'S INTERVENTION.

The respondents filed their motion to intervene for purposes of appealing the final judgment a few weeks prior to the expiration of time for the government to file its Notice of Appeal. 2 CR 47, Con.App. 320a. Respondents consist of 123 persons who reside in the Imperial Valley and alleged that most of them are agricultural workers who do not own farm land anywhere in the United States, but wish to purchase the excess lands being irrigated with Colorado River water delivered to the Imperial Valley through the All-American Canal. One of the respondents, Ben Yellen, a physician, stated in his Affidavit that he was personally acquainted with all of the respondents, most of them have been employed as agricultural workers within the District, none of the respondents own farm land anywhere in the United States, and all of them wish to own land to engage in farming. In addition, he stated that land in the Valley without water has a market value and sells for approximately $25.00 to $50.00 per acre, while land irrigated with Colorado River water delivered through the All-American Canal has a value and sells for between $1,200.00 and $1,400.00 per acre, and that respondents are unable to purchase irrigated lands unless the

government appealed the adverse judgment of the district court and ultimately prevailed so that the excess lands would be sold under conditions established by the Secretary of the Interior. 1 CR 169, Con.App. 323a.

At the time respondents sought intervention, they were parties to another case pending in the district court where they sought to compel the Secretary of the Interior to enforce the residency requirement of § 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 431 and alleged that the finality of the acreage case would preclude them from proceeding in the residency case. Section 5 reads:

> No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred sixty acres to any one landowner and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

Respondents alleged in the residency case that approximately 70% of the privately owned land being irrigated in the District was owned by persons who were neither bona fide residents on such land, nor occupants thereof residing in the neighborhood of the land, as expressly prohibited by § 5. By reason of the failure of the Secretary to require compliance with the residency requirement and by providing irrigation water to lands owned by non-residents, water was being supplied for ownerships which were investment interests in farms rather than working interests, irrigated farms were being leased by non-resident owners, there was land speculation, and the cost of land had risen to unreasonably high prices so that there was no land available to purchase and homestead within the District. 1 CR 204, 209-10. Respondents' complaint was before the district court in the present case at the time

of the intervention motion and is part of the record on appeal. At the hearing on respondents' intervention motion, the attorney requested the clerk to bring the file from the companion residency case and requested the court to take judicial notice of the contents of that file. Tr. March 29, 1971, 12:21-13:2. Counsel for the District stated that he had read the file of the residency case prior to the hearing. *Id.*, 13:24-14-1.

Ultimately, partial summary judgment and final judgment were entered in favor of respondents. 235 F.Supp. 200 (S.D.Cal. 1971), 352 F. Supp. 1300 (S.D.Cal. 1972). The court of appeals reversed the final judgment because of respondents' lack of standing, without voicing an opinion on the merits. 559 F.2d 509 (9th Cir. 1977). In view of the decision of the Secretary to enforce the residency requirement, announced 4 days after the Ninth Circuit's opinion was filed, respondents did not petition for re-hearing or seek review in this Court. 43 C.F.R. § 426, Dist.App. 217a. A formal Solicitor's Opinion upholding the residencey requirement was filed December 6, 1979. Sol.Op.M-36919.

The challenge in this Court to respondents' status questions their "appealable interest" and is a "standing to sue" argument. When respondents attempted to enter the case after judgment in the district court, they did not file a complaint but simply filed affidavits in support of their motion to intervene. No affidavits were filed in opposition by the government, the landowners or the District. If respondents had filed a complaint and petitioners had moved to dismiss for lack of standing, all material allegations of the complaint would be deemed to be true. *E.g., Warth v. Seldin,* 422 U.S. 490, 501 (1975). The trial court has the power to allow or require a plaintiff to provide "further particularized allegations of fact deemed supportive of plaintiff's standing." *Ibid.* Leave to amend, at least once, would have been granted in an important case

such as the case at bench. *Dowdy v. Procter & Gamble Manufacturing Company,* 267 F.2d 827, 828 (9th Cir. 1959).[123]

Along with eleven affidavits from among their number, respondents filed an affidavit of former Solicitor Barry. Solicitor Barry voiced his opinion that the present case involved important considerations of national policy and that the final judgment of the District Court should be appealed so that these important considerations of national policy could be finally resolved by the appellate courts. 1 CT 161, Con.App. 346a.

Respondents' documentation also included a copy of a newspaper article from the February 25, 1971 edition of the *Sacramento Bee,* where it was reported that the Interior and Justice Departments each denied that it would make the decision as to whether or not the government would appeal the judgment. Each department claimed it would only make a "recommendation" and asserted that the other would make the decision. 2 CR 60, Con.App. 349a.

The government filed no documents in opposition to the application for intervention. At the hearing on the Intervention motion on March 29, 1971 (the time to appeal expired April 9, 1971), the Assistant United States Attor-

[123]Plaintiffs must be provided an opportunity to be heard before their action is dismissed. *Harmon v. Superior Court,* 307 F.2d 796 (9th Cir. 1962); *Potter v. McCall,* 433 F.2d 1087, 1088-89 (9th Cir. 1970); *California Diversified Promotions, Inc. v. Musick,* 505 F.2d 278, 280-281 (9th Cir. 1974). If a motion to dismiss on the standing issue is granted, the court is required to advise the plaintiffs of the reason for the dismissal so that they could make an intelligent choice as to amending. *Bonanno v. Thomas,* 309 F.2d 320, 322 (9th Cir. 1962). Leave to amend is to be freely given if it appears at all possible that a plaintiff can correct the defect. Rule 15, Fed.R.Civ.P. Respondents were not provided an opportunity to supplement or improve upon their affidavits. However, in view of the unusual posture of this case, respondents suggest that all possible favorable inferences be drawn from the affidavits so that the Court may reach a final resolution of this dispute.

ney was unable or unwilling to state whether or not the government intended to appeal. After advising the Court that he had recently been in contact with the Chief of the Litigation Section of the Land and Natural Resources Division of the Justice Department, the counsel for the government stated:

> I have been told that the decision (whether or not to appeal) has not yet been made; and when it is made, the Court and all parties would be appropriately notified, and promptly; that it would be improper to infer from, based on newspaper articles or other kinds of speculation, that the government would not take an appeal. Tr. March 29, 1971, 22:2-7.

As matters turned out, only eleven days later, the "speculation" from the newspaper articles proved to be correct and the government did not appeal from a case which had been in litigation in the trial court for a period of four years and involved the vast benefits received from the expenditure of millions of dollars of public funds on one of our major reclamation projects.

At the conclusion of the hearing, the district court made an order denying respondents' motion to intervene. 1 CR 165, Con.App. 352a. Although finding the application to intervene to be timely and without prejudice to the existing parties, intervention was denied on the grounds that respondents were barred by the doctrine of *res judicata* because of the confirmation proceedings in the *Hewes* case, respondents did not have sufficient interest to warrant intervention and their interests, if any, were being adequately represented by the government. Respondents then filed a protective notice of appeal. 2 CR 45.

A panel of the Ninth Circuit reversed the order denying intervention and validated the protective notice of appeal. 559 F.2d 543. The only reason given by the panel was the decisional conflict between the judgment of the

district court in the acreage case and the judgment entered by a different judge in the residency case:

> . . . because it is the responsibility of this court to avoid, where feasible, the confusion and uncertainty that would result if two conflicting decisions on legal issues of public and private importance should be enforced in this circuit. *Ibid.*

The conflict arose because the District Judge in the residency case concluded that § 14 of the Project Act incorporated the anti-monopoly of reclamation law, while the District Judge in the acreage case held to the contrary.

The appeal on the merits came before a different panel. In view of its disposition of the residency case, the court chose to reexamine the earlier order allowing intervention, rather than adhering to the "law of the case" doctrine. 559 F.2d at 520.

The Ninth Circuit acknowledged that a party need not possess the standing necessary to institute a law suit in order to intervene pursuant to Rule 24, Fed. R. Civ. P., 559 F.2d at 521. *Trbovich v. United Mine Workers of America,* 404 U.S. 528 (1972). Nevertheless, the court held that a party having the requisite interest to intervene does not automatically have the ability to appeal a decision which the other parties have decided not to appeal. In order to determine if respondents had an "appealable interest", the court applied a "standing to sue" test. 559 F.2d 521.

The Ninth Circuit concluded that respondents had an interest under Rule 24(a)(2) to pursue the appeal. In reaching this conclusion, the court considered three factors:

(1) It looked to one of the primary purposes of the Reclamation Act, the establishment of a large number of family size farms (559 F.2d at 521-522);

(2) It found respondents were injured by reason of the fact that they would have to pay prices for excess lands which would be higher than they would have to pay if § 46 applied to private landowners in the Imperial Valley (*Id.* at 522); and

(3) It concluded that respondents, as non-landowning residents of an area where agriculture is feasible only because of a federal irrigation project who desire to purchase agricultural land and become farmers, are particular "beneficiaries" of § 46 and thus possess an interest sufficiently within the "zone of interests" protected by § 46 (*Id.* at 523).

The panel's determination of respondents' standing is completely consistent with the Secretary's present scheme to enforce the sale of excess land under recordable contracts. Dist. App. 217a, 43 C.F.R. § 426. As eligible nonexcess owners, respondents would be in a position to obtain some of the excess lands at below market prices. Project water may be delivered to excess land only on condition that the excess landowner "executes a valid recordable contract for the sale of that land to a nonexcess owner". 43 C.F.R. § 426.5a (1).

The purchaser is to be selected by the Secretary under a plan designed to discourage fraudulent, bogus and other means designed to circumvent the policy of the law.

> . . . the Secretary shall publish widely the notice of availability of such land, which describes the land and its possible uses, and which includes the expiration date of the recordable contract. (2) All prospective eligible nonexcess owners interested in purchasing a particular parcel shall file with the Regional Director (of the Bureau of Reclamation) a formal expression of interest which will describe their financial and other capacity to own and farm the land. (3) When the owner of the particular parcel under recordable contract desires to sell the land, or when

> power of attorney vests in the Secretary under the recordable contract, the Bureau shall select, by lottery, or other impartial means from those expressing an interest, a purchaser of the land at the approved price. § 426.10(b).

A prospective purchaser shall have ninety days to obtain financing and this period may be extended upon good cause. § 426.10(b)(4).

The court of appeals reversed the order denying intervention on all grounds. 559 F.2d at 523, n. 23. Petitioners challenge only the court's conclusion that respondents possess an appealable interest.

9. THE GOVERNMENT'S DECISION NOT TO APPEAL.

Apparently unwilling to have the issues in this case decided on their substantive merits alone, petitioners have made a blatant attempt to prejudice this Court by announcing that the government did not appeal the judgment of the district court because Solicitor General Griswold "determined that the judgment of the trial court was correct and should not be appealed" and that he "became convinced (a) we would not win the case in the court of appeals and (b) we should not win it". L.Br. 3, 17, Dist.Br. 5. Petitioners make no reference to the trial record but to material in the Congressional Record where Solicitor General Griswold defended his decision not to appeal. To date, neither the government nor Solicitor General Griswold has ever provided a public explanation for the decision. In view of the repeated efforts of petitioners to bring this matter to the attention of the Court, respondents are compelled to make a full response and place the matter in context.

Solicitor General Griswold was obviously wrong in his prediction about the outcome of the appeal in the court of appeals. More importantly (and respondents present this discussion only with the greatest reluctance), reference to

other available material raises grave questions about the motive for the decision.

After the district court's opinion was filed, landowner-petitioner Stephen H. Elmore, who farms 14,000 acres in the Imperial Valley with his family and was a neighbor of then President Nixon in San Clemente, went to Washington with his attorneys and met with Justice Department officials when an appeal was under consideration. *Will the Family Farm Survive in America?* Joint Hearings Before Senate Select Comm. on Small Business and Comm. on Interior and Insular Affairs, 94th Cong. 1st Sess., Part 1A 601-02 (1975). At the same time, Senator Clinton P. Anderson, Chairman of the Senate Sub-Committee on Water and Power Resources, wrote to Attorney General Mitchell and pointed out that the district court's decision undermined policy on reclamation projects throughout the West:

> . . . nearly all Federal reclamation projects for many years have been authorized by statutes employing language similar to that used in the Boulder Canyon Project Act, which the District Court held did not incorporate the excess-land limitations by reference . . .
>
> . . . it has never been questioned that the language in these authorizing acts which is substantially identical to section 14 of the Boulder Canyon Project Act, makes the excess-land limitations of the federal reclamation laws applicable. The District Court's opinion now, for the first time, raises a substantial question regarding whether the Department of the Interior, the Congress and the water user groups seeking project authorizations have been in error in assuming that authorizing a Project subject to the Federal reclamation laws makes excess-land limitations applicable. *Will The Family Farm Survive in America?, supra* at 565.

Senator Anderson voiced concern that the district court's opinion would apply to the Central Arizona Project and

upper basin projects authorized in the Colorado River Basin Project Act of 1968 (P.L. 90-537), the Colorado River Storage Project Act of 1956, and the Central Valley Project in California. He expressed these fears to Interior Solicitor Melich:

> A second area of uncertainty introduced by the opinion deals with the relationship between excess-land limitations and pre-project use of water. These uncertainties are westwide in their implications . . . Certainly, any suggestion that supplemental water projects should be exempt from the excess land laws by Congress would engender great controversy. When such an attempt was made back in the middle '40's involving principally the Central Valley Project, it was rejected by the Congress, but the turmoil that ensued plagued the reclamation program for many years. A lower court holding that can be read as possibly having such an effect can be expected to give rise to extensive controversy in connection with future authorizations which could have a substantial adverse impact upon the reclamation program . . . .
>
> As for the merits of the legal question, there is substantial doubt concerning the legal validity of the Court's holding as demonstrated by the fact that the Solicitor General of the United States in the Eisenhower administration felt it necessary to state the Supreme Court's Special Master hearing Arizona v. California that, in his opinion, excess-land limitations are fully applicable. *Will The Family Farm Survive in America?, supra* at 566-67.

Despite the urging of Senator Anderson, Deputy Attorney General Kleindienst, Secretary Morton and Solicitor Melich recommended against taking an appeal. The record does not show the reasons, if any, for this recommendation. Assistant Attorney General Shiro Kashiwa of the Lands Division and three members of the Solicitor General's staff recommended that the appeal be taken. 126 Cong.Rec. S1632 (daily ed. Feb. 20, 1980).

Reference to the material cited by petitioners from the Congressional Record discloses that Solicitor General Griswold was compelled to provide a private explanation—no public explanation has ever been given—because of a critical letter he received from a private citizen in Manhattan, Kansas who read about his decision not to appeal in a magazine.

> . . . The report of your part in the decision not to appeal makes you appear to be a man of little integrity. If you can explain how a man with respect for the law of the land, as passed by Congress and validated by the President's signature can countenance such action, or lack of it, I would appreciate hearing it.
>
> The whole action smells of rot at the core of our government and makes me wonder whether the long-haired kids who talk of getting rid of it may not have some validity to their thinking.
>
> Yours with dwindling respect,
> Mrs. Stephen L. Stover

Will the Family Farm Survive in America? supra at 571.

It is significant that Solicitor General Griswold's letter and its erroneous conclusion evoked responses from Professor Joseph L. Sax, author of the leading text on the Reclamation Act:

> September 1, 1971.
>
> Hon. Erwin N. Griswold,
> Solicitor General of the United States, U.S. Department of Justice, Washington, D.C.
>
> Dear General Griswold:
>
> Someone sent me a copy of a letter that went out under your signature, dated June 1, 1971, to Mrs. Stephen L. Stover of Manhattan, Kansas. The letter inquired about the position of the Justice Department in the excess land case involving the Imperial Valley in California.

As one who has written about the Reclamation law, I was surprised to see in your letter the following:

"... There is a provision in the reclamation laws which provide that when land is reclaimed through a federal project, land holdings cannot exceed 160 acres . . . no land was reclaimed by the construction of the All-American Canal."

Occasionally one recalls the warnings he received in law school, among them the danger in paraphrasing statutory language. My recollection is that the excess land provision of the Reclamation Law, 43 U.S.C. Section 431, says:

"No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one land owner."

I recall no general provision in the law that limits the excess land law to land "reclaimed through a federal project," and if you examine the legislative history of the statute, you will recall that Representative Newlands, the sponsor of the Act, took no such view. 36 Cong.Rec. 6734 (1902). Of course a great many reclamation projects involve the supply of supplementary water to land already in cultivation. To the best of my knowledge it has never been thought that this fact exempted the project from the provision of the excess land law.

I recognize that the Imperial Valley case was a complex one; but I think Mrs. Stover was entitled to a more accurate explanation.

Very truly yours,
Joseph L. Sax,
Professor of Law.

September 21, 1971.

ERWIN N. GRISWOLD,
Solicitor General, Office of the Solicitor General, Washington, D.C.

DEAR GENERAL GRISWOLD: I appreciate very much that you took the time to reply to my letter of September 1, commenting on the Imperial Irrigation District case.

I know it would be an imposition to engage you in further correspondence, but I hope you will permit me to make an observation or two about the future.

As you know, for many years the excess land law was little enforced, and the residency requirement of the reclamation law has been wholly ignored. Those concerned about reclamation law were therefore understandably pleased when the Interior and Justice Departments decided to go forward with the IID case. I recognize the complexity of the issues there, but I hope that the Department of Justice will make a concerted effort to enforce the excess land law.

Though bills are annually introduced in Congress calling for repeal of the excess land provisions as an anachronism, this is certainly not the case. A great many agricultural workers, particularly in California, would welcome the opportunity to become farm owners, if only that opportunity to acquire fertile farm lands were made under reasonable circumstances. Indeed it is my own view, that many of the current farm labor problems would be best resolved by encouraging the creation of an owner class among family farmers.

At the present time non-enforcement or limited enforcement of the excess land and residential laws stand as an obstacle to this development. Once the laws are enforced, of course, steps will have to be taken to assure credit for the purchase of farm lands so the job is a complex and extended one; but enforcement of the law is a needed first step.

It may seem romantic today to suggest that the very motive that lay behind enactment of the reclamation law in 1902 is still a sensible policy today; but I am sure that as you look into the question, you will find many very well informed people who think that this is precisely the case.

It is often said that the excess land law cannot work because small farms are uneconomic. Even to the ex-

tent that this is true, which does not speak to the problem of ownership, but only to management practices, if it is economically necessary to operate and market farm products on a large scale, it is perfectly possible to do this by cooperative arrangements among a number of owners of modest sized family farms.

I make these comments only because it is so widely believed in Washington that no significant public policy could be advanced by vigorous enforcement of the reclamation law. Perhaps this view affected your own judgment about the IID case. If so, I hope you will explore the question further as opportunities arise.

Cordially yours,

JOSEPH L. SAX,
Professor of Law.

P.S.—I am very glad to follow your suggestion about distribution of the letter you sent me on September 16. I am, however, sending copies of this letter to several interested parties.

Will the Family Farm Survive in America, supra at 588-89.

When Solicitor General Griswold made his decision not to appeal, he felt it necessary to prepare a Memorandum for the Files. 126 Cong.Rec. S1632 (daily ed. Feb. 20, 1980). Significantly, he did not take the opportunity to either analyze or defend the substance of the Wilbur letter. The reasons given by Solicitor General Griswold were ultimately rejected by the court of appeals.

SUMMARY OF ARGUMENT

This is a case where 150 farming operations of 1,000 acres or more think they have a vested right to the Colorado River in perpetuity. Although they have paid nothing for constructing the high dam at Black Canyon, nothing for the storage facilities in Lake Mead, and nothing for the costs of constructing the All-American Canal, they have the temerity to tell this Court that they should be allowed to retain the water subsidy intended for others because it would be "blatantly unfair" to require them to obey the law. L.Br. 24. The arguments of petitioners have an "Alice in Wonderland" ring to them. Where else, but in petitioners' fantasyland, would a handful of businessmen who have received hundreds of millions of dollars worth of the West's liquid gold for 40 years contrary to the law of the land, have the effrontery to tell this Court that they should be allowed to continue receiving it because of "fairness"? And where else, one might ask, would a public agency like the Imperial Irrigation District misrepresent the source of repayment of $12.5 million in construction costs of the All-American Canal and accuse those persons whom Congress clearly intended to receive the water subsidy with "ripping off" those who have benefited by an erroneous administrative decision totally lacking in substantive merit? Dist. Br. 73.

It is unfortunate that the District has found it necessary to resort to the language of the street, rather than the language of the courtroom. But none of the wild charges hurled about by petitioners can obscure the fact that their success in this case would not serve national reclamation policy and would continue to frustrate that policy as it has been frustrated the past 40 years in the Imperial Valley. Notably absent from their detailed and carefully drafted overly ingenious arguments is any suggestion that our important national reclamation policy would be served

by continued adherence to the discredited Wilbur letter. Their efforts to portray the few hundred entities in whose behalf these proceedings continue as "family farmers" cannot obscure the actual characteristics of landownership in the Imperial Valley.

Statutory Construction

The plain terms of the Project Act require application of the 160 acre limitation. Section 14 provides that the Act is to be deemed a supplement to the reclamation law and is to govern the construction, operation and management of the authorized works, except as otherwise provided. Section 12 of the Project Act defines "reclamation law" as the Reclamation Act of June 17, 1902. The rule of construction governing the interpretation of cases arising under the reclamation law concerned with the acreage limitation was spelled out by this Court in *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 292 (1958). The Court held that "where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment". There are numerous examples of reclamation projects where Congress has specifically relieved large landowners from the requirement of complying with the 160-acre limitation. The Boulder Canyon Project Act does not contain an express exemption. The efforts of petitioners to dissect each section of the Project Act in search of the hidden exemption merely illustrates that Congress declined to provide the relief in 1928 that the handful of excess landowners in the Imperial Valley have succeeded in obtaining from the Senate last year. S. 14, 96th Cong. 1st Sess. (1979), 125 Cong. Rec. S 12594 (daily ed. Sept. 14, 1979).

The various sections of the Project Act emphasized by petitioners as representative of an exemption make no mention of excusing compliance with the excess land law.

The Project Act involved more than a single state and some portions of the legislation were tailored to meet those unusual needs. However, none of the slight deviations from the general scheme of reclamation law are significant.

The Secretary's obligation under § 6 of the Project Act to satisfy present perfected rights was intended to assure that specific quantities of water would be available from the storage facilities in amounts approximately commensurate with usage prior to the Project. References to present perfected rights do not represent a shorthand means of excusing compliance with the acreage limitation.

Legislative History

The legislative history of the Project Act was primarily concerned with the issues of the proper apportionment of the waters from the Colorado River and the financial feasibility of the project. Very little was said concerning the anti-monopoly provisions of reclamation law. What finally emerged was § 14 of the Project Act incorporating reclamation law. The language of § 14 is similar to that in other reclamation legislation and the record does not show that anyone in Congress considered § 14 to require any less compliance with reclamation law in the Imperial and Coachella Valleys than in service areas of other reclamation projects. Since the acreage limitation occupies a keystone position in the reclamation law, it was incumbent upon petitioners to establish the clear legislative intent to excuse the large landowners of the Imperial Valley from compliance with the regulation of the water subsidy. Their briefs fail completely to establish any such Congressional intent. This inadequacy is understandable, for not even Secretary Wilbur, former Solicitor General Griswold or any of the other government officials who have favored petitioners' position have ever considered the legislative history to be helpful.

Administrative Practice

The administrative practice of ignoring the acreage limitation in the Imperial Valley arose out of a request from the attorney for the Imperial Irrigation District who sought a Solicitor's Opinion that the acre limitation did not apply, but specified that he did not want an opinion if the conclusion was adverse. A few days later, a letter was prepared for the signature of Secretary of Interior Wilbur. It was prepared without the assistance of the Solicitor of the Department of the Interior. At the time it was written, the All-American Canal contract had already been executed by the parties and the electors of the District had already voted to approve the contract. When the practice of nonenforcement began, it represented an abrupt change and a lone exception to the then prevailing practice governing enforcement of the acreage limitation where landowners receiving project water had preexisting "vested rights". The practice was then, and still is, that the acreage limitation applies despite the existence of pre-project water rights.

The Wilbur letter, containing few of the legal explanations offered by petitioners in this case for not adhering to the law, was never supported by a legal analysis in the Department of Interior. On each and every occasion when the informal letter was subjected to legal analysis, both its reasoning and conclusions were rejected. These rejections were from Interior Solicitor Harper in 1945, Solicitor General Rankin in 1958, Interior Solicitor Barry in 1964 and the Ninth Circuit in 1977. The Court of Appeals considered the Wilbur letter to be a "rather simplistic analysis not contained in a formal opinion" and there are few, if any, supporters to this day.

The administrative practice relied on by petitioners was not based upon legal analysis, but was simply inaction based upon previous inaction. Following the Opinion of

Solicitor Harper in 1945, the Department followed inconsistent practices under the Project Act by adhering to the Wilbur letter's conclusion that the acreage limitation did not apply in the Imperial Valley, while at the same time adhering to Solicitor Harper's Opinion that the acreage limitation did apply in the Coachella Valley. Both Valleys are serviced by the All-American Canal and both are treated identically in the Project Act. These inconsistent practices continued until December, 1964 when Solicitor Barry, in a formal opinion, rejected the substance of the Wilbur letter and changed the practice of nonenforcement with respect to the Imperial Valley.

The practice of nonenforcement commencing with the Wilbur letter was not designed to follow the principles of national reclamation policy. That policy is to encourage the establishment and maintenance of family-sized farms. The Wilbur letter did just the opposite by encouraging the maintenance of the large ownerships existing in the Imperial Valley since enactment of the Project Act and continuing until today. This practice, so patently wrong and directly in conflict with the purposes of the Reclamation Act, does not warrant being elevated into an administrative determination to which the Court should defer.

Res Judicata and Full Faith and Credit

The defense of the *res judicata* effect of the *Hewes* decision against respondents' intervention was not and could not be raised against the government because of sovereign immunity. Whatever imaginary problems petitioners encounter by reason of respondents' entry into the case (L.Br. 58) are no more than those anticipated when the government litigated the case in the district court. The issue is present now only by reason of the government's decision not to appeal the judgment of the district court.

The disfavored plea of *res judicata* does not bar respondents for a number of reasons. The *Hewes* case was not an adversary proceeding on the issue of the acreage limitation. Both the District and Malan wanted a determination that the acreage limitation did not apply. Furthermore, a determination of that issue was not necessary in a confirmation proceeding and, under California law, it was dicta and does not have preclusive effect. If the *Hewes* judgment is the proper subject for *res judicata*, then there are many well established principles recognized in both federal and state courts allowing the courts to refuse to entertain the plea where there has been a subsequent change in the law after rendition of the original decision or if its application would be contrary to important considerations of policy. Subsequent to the entry of the superior court's judgment, there have been many administrative and judicial refinements in the reclamation law, all contrary to both the *Hewes* judgment and the Wilbur letter. The acreage limitation represents one of the cornerstones of national reclamation policy and application of *res judicata* would be directly contrary to that policy.

Appealable Interest

Since the original plaintiff, the government, did not appeal, respondents' right to pursue the appeal requires a determination of whether or not they have an appealable interest. In turn, the latter turns on traditional standing to sue principles. Respondents' injury is their inability to buy excess lands in the Imperial Valley at below market prices. Under § 46, over a quarter million acres of some of the richest farm land in the world will be sold at below market prices if the decision of the court of appeals is affirmed. Respondents all reside in the District and most of them are agricultural workers. The Secretary of Interior has published proposed regulations

which would limit the ability of excess landowners to choose their own purchasers and assist respondents in purchasing these lands.

Under the unique procedure mandated by § 46 of the Omnibus Adjustment Act of 1926, respondents will have an unusual opportunity to purchase some of the richest farm land in the world at below market prices. The statutory mechanism for enforcing the acreage limitation is the use of the recordable contract. In order to receive project water for more than 160 acres in an individual ownership, the landowners must agree to sell their excess land at prices which do not take into consideration the value of a project.

Experience in the reclamation program shows that excess landowners never hesitate to execute recordable contracts. The former chief counsel of the Imperial Irrigation District stated to a Congressional committee that excess landowners are willing to execute recordable contracts in order to receive project water to irrigate their excess acres during the period of the contract. In the Imperial Valley, desert conditions prevail, and the landowners testified that they could not use their land for any purpose other than farming. Since they have a large investment in improvements in their lands, the only feasible means for obtaining a return on their improvements would be to sign recordable contracts, for the value of improvements is to be considered in the appraisals of excess lands.

Section 46 consists of two parts concerning the sale of excess lands. First, it provides that the Secretary shall exercise price control until there has been an initial breakup of excess lands. Second, after the initial breakup, § 46 provides that the Secretary may exercise price control only until one-half of the construction costs are repaid to the government. In the case at bench, since

the District has reached the half way mark during the course of this appeal, price control would be exercised only before the initial breakup.

ARGUMENT

I. THE PLAIN TERMS OF THE BOULDER CANYON PROJECT ACT MANDATE COMPLIANCE WITH THE ANTI-MONOPOLY PROVISION OF RECLAMATION LAW.

The numerous references to reclamation law appearing throughout the Project Act make it readily apparent that Congress intended this massive project to be a reclamation project subject to reclamation law. In the landmark case dealing with the 160-acre limitation of reclamation law, *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 292 (1958), this Court enunciated the controlling rule of statutory construction in cases concerned with the reclamation law:

> Significantly, where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactments.

The Court's reasoning is not subject to challenge. Where special or unique circumstances exist so as to justify deviating from the well-recognized important considerations of national policy behind the 160-acre limitation, Congress has made clear, unambiguous, and specific exemptions from the excess land provisions of the federal reclamation laws. For example, the Act of June 27, 1952, 66 Stat.282 (San Luis Valley Project, Colorado) provides:

> The excess-land provisions of the Federal reclamation laws shall not be applicable to lands or to the ownership of lands which receive a supplemental or regulated supply of water from the San Luis Valley project, Colorado. . . .

The Act of July 24, 1957, 71 Stat. 309 (Missouri River Basin, East Bench Unit) provides:

> Except as provided in section 2 of this Act, the excess land provisions of the Federal reclamation laws shall not apply to lands . . . of the East Bench unit of the Missouri River Basin project, . . . that are irrigated under existing State water rights, whether the waters used for their irrigation are passed through, regulated by, or stored in the Clark Canyon Reservoir by the United States.

The Act of April 7, 1958, 72 Stat. 82 (Lower Rio Grande Project, Mercedes Division) provides:

> The excess-land provisions of the Federal reclamation laws shall not be applicable to lands in this project which now have an irrigation water supply from sources other than a Federal reclamation project, and for which no new waters are being developed.

There are numerous other similar examples of specific statutory exemptions.[124]

Before examining the various sections of the Project Act for hidden meanings, a few comments are in order concerning petitioners' approach to the *Ivanhoe* rule. With the agility to be envied by the best of broken-field runners, petitioners chart a long, tortured journey in search of a statutory exemption, beginning with "present perfected rights" under Article VIII of the compact, moving on to the decrees in *Arizona v. California* and finishing in the thicket of California water law. This roving excursion can

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[124] Act of June 16, 1938, 52 Stat. 764, 43 U.S.C. § 386 (Colorado-Big Thompson Project); Act of November 29, 1940, 54 Stat. 1219 (Truckee River and Humboldt Projects); Act of August 28, 1954, 68 Stat. 390 (Owl Creek Unit, Missouri River Basin Project); Act of August 6, 1956, 70 Stat. 1044, 43 U.S.C. § 422(f) (small reclamation projects); Act of September 4, 1957, 71 Stat. 608 (Kendrick Project); Act of December 22, 1959, 72 Stat. 641 (Lower Rio Grande Rehabilitation Project, La Feria Division); Act of October 1, 1962, 76 Stat. 677, 16 U.S.C. § 835a (Columbia Basin Project).

hardly satisfy the "exemption by express enactment" required by *Ivanhoe*. In apparent recognition of this shortcoming, the District contends that *Ivanhoe* does not apply because it was concerned with a different reclamation project where the factual circumstances were slightly different. Dist.Br. 21, 37. This sophistry is unavailing, for the entire thrust of the *Ivanhoe* rule of statutory construction was obviously intended to encompass *all* reclamation projects, because, as the Court reasoned, if there were factual circumstances which warranted an exemption, Congress would have made the "exemption by express enactment" rather than placing the burden on the courts to search out enigmatic meanings of simple terms.

Petitioners appear to be confused about this rule, for they repeatedly emphasize that the Project Act did not make specific reference to the 160-acre limitation. Nothing in this Court's decision in *California v. United States,* 438 U.S. 645, undermines the rule of construction as it relates to the acreage limitation. 438 U.S. 668-69, n. 21, 678, n. 31. The *Ivanhoe* rule was not a recent revelation of this Court, for it logically followed from the canon of strict construction applicable in cases of government grants. *E.g., Dubuque & Pacific R.R. Co. v. Litchfield,* 64 U.S. 66, 88-90 (1860):

> The reason of [this] rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretations and insinuation, that which can not be obtained by plain and express terms.

The Court could have been speaking with specific reference to the Project Act, for its leader in the House was

Congressman Phil Swing, who has been referred to as "the talented chief counsel of the [Imperial] Irrigation District and a prominent valley spokesman almost from the day of his arrival in 1907 . . . In 1911, following his appointment as chief counsel for the district, he supervised the purchase of the water-delivery system from the Southern Pacific and made a study of water problems which convinced him of the need for federal help. As early as 1918, he had gone to Washington to push for 'one great irrigation project' for the entire basin, but his experiences persuaded him that the Valley would be better served by concentrating its efforts on an All-American Canal." Hundley, *Water and the West* 41-42. After leaving office, Congressman Swing was retained as a Washington lobbyist for the Imperial Irrigation District to lobby for appropriations for the construction of the All-American Canal. LX-AY

At the time the proposals leading up to passage of the Project Act were occupying the attention of Congress, various revisions of the general reclamation laws, culminating in § 46 of the Omnibus Adjustment Act of 1926, had been enacted into law. Section 14 of the Project Act states that "[T]his act shall be deemed a supplement to the reclamation law which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. Section 12 of the Project Act defines "reclamation law" to mean the Reclamation Act of 1902 "and the acts amendatory thereof and supplemental thereto." 43 U.S.C. § 617k. By operation of § 12 and § 14, the Project Act was incorporated into the framework of the reclamation laws, including § 46 that had recently been considered by Congress and that had been the subject of national concern for some time.

Section 1 of the Project Act, 43 U.S.C. § 617, authorizes construction of a main canal and appurtenant structures located entirely within the United States to deliver water from the Colorado River to the Imperial and Coachella Valleys. While providing that there be no charge for the water or the "use, storage, or delivery" of the water, § 1 requires that expenditures by the United States for the "main canal and appurtenant structures" be reimbursable "as provided in the reclamation law." Section 4(b) of the Project Act, 43 U.S.C. § 627c(b) mandates that reimbursement be secured by the Secretary of the Interior "by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law."

Section 14 of the Project Act reinforces the command of § 4(b) by providing that the "reclamation law shall govern the construction, operation and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. The Project Act thus explicitly calls for the reclamation law to govern contracts for payment to the United States for the "construction, operation, and maintenance" of the All-American Canal.

The Project Act was approved December 21, 1928, and it became effective on June 25, 1979. At that time, the portion of the reclamation law governing contracts for payment of the costs of "constructing, operating, and maintaining" works on the new reclamation projects was Section 46. Section 46 requires that such contracts provide that private lands in excess of 160 acres should not receive water from the reclamation project unless the owners agree to sell their excess lands according to the scheme set out in § 46. By direct scrutiny of the statutory language, it is apparent that the acreage limitations of § 46

apply to private lands in the Imperial Irrigation District that receive irrigation water from the All-American Canal.

A. The water charge exemption in § 1 does not excuse compliance with the 160-acre limitation.

Section 1 of the Project Act provides that there is to be no charge for the "use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys". 43 U.S.C. § 617. The landowners contend that this water charge exemption means that Congress intended that the acreage limitation not apply to the Imperial Valley. They find their support, not in the statutory language itself, but in the informal Wilbur letter. It is obvious that § 1 does not even remotely suggest an exemption from the acreage limitation, for that section is simply another subsidy along with the 50-year interest-free repayment arrangement and the regulated flow of the Colorado River.

More importantly, landowners' argument about § 1 is proof positive of the utter lack of merit in the inconsistent contentions advanced by petitioners in this proceeding. When respondents filed their memorandum in opposition to the petitions for writs of certiorari, they pointed out the inconsistent administrative rulings and interpretations by Secretary Wilbur (exempting the Imperial Valley) and Solicitor Harper (concluding that the acreage limitation applied in the Coachella Valley). The District filed a reply brief in which it considered respondents' discussion of the inconsistent administrative interpretations as:

> . . . misleading because Coachella Valley County Water District has no present perfected rights which the Secretary must satisfy under § 6 of the Project Act. Delivery of water from the Colorado River to Coachella Valley did not commence until 1952; this Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), restricts present perfected rights to quan-

> tities of water used prior to June 25, 1929, the effective date of the Project Act. Obviously, in places like Coachella that have no present perfected rights, § 6 of the Project Act (which requires the satisfaction of present prefected rights) is not applicable. Therefore, administrative construction of the Project Act with respect to Coachella Valley is not relevant to determining the proper application of § 6 to Imperial Valley. Dist.Reply Br. 5.

In their brief on the merits, the landowners also present an argument that the Coachella Valley is not in the same legal situation as the Imperial Valley. Their reason is that the government's contract with the Coachella Valley County Water District, the subject of Solicitor Harper's opinion, was "unlike the Imperial Irrigation District contract, [because] its purpose was to provide for construction of an irrigation distribution system for Coachella. The farmers in the Coachella Valley had no pre-existing rights to water from the Colorado River". L.Br. 15, n.14.

In urging the proposition on this Court that § 1 of the Project Act provides for an exemption from the acreage limitation, the landowners rely on statutory language providing the identical treatment to both the Imperial and Coachella Valleys. Thus, if § 1 provides an exemption for one Valley, it provides it for the other. At the same time, when officials of the Interior Department make inconsistent rulings relating to each Valley, peitioners then switch to the other side of the coin and tell the Court that there are different circumstances not stated in the statute which justify different treatment.

The purpose of § 1 was to insure that persons in the Imperial and Coachella Valleys would not be required to pay for the storage facilities in Lake Mead. The water charge exemption arose as an amendment to S. 728, 70th Cong., 1st Sess. 1927, sometimes known as "the Fourth

Swing-Johnson Bill" in the Senate Committee on Irrigation and Reclamation. At issue was the question whether Imperial Valley lands to be benefited by the water storage and regulation features of the Project should pay a charge for storage. Under the proposed legislation, those lands were already exempted from any repayment obligations for the cost of construction and maintenance of the main dam in Boulder Canyon which was to provide storage capacity, flood control and a hydro-electric power head. Senator Phipps of Colorado questioned this exemption:

> [M]any of the Senators have called attention to the practice under the Reclamation Law whereby every project that has been so far instituted has been required to pay not only for all canals for transporting the water, but also for the dams which retain the water for storage purposes. 70 Cong. Rec. 529 (1928).

The water charge exemption was a grant—a subsidy of free storage capacity and service—extended in consideration of the fact that Colorado River water had been appropriated and used for many years in the Imperial Valley as well as because of the division of opinion among members of Congress as to what effect should be given to the vigorously asserted claims to vested water rights by prior appropriation under state law which were made by Imperial Valley interests. While it was recognized that Colorado River water had already been used for irrigation purposes in the Imperial Valley at the time of the enactment of the Project Act (albeit unsatisfactorily), the basis for § 1 was because it:

> . . . might be questionable whether we would have the power to impose a charge upon them for the use of water. At any rate, I gave them [i.e., those representing the California side of the debate] the benefit of all doubt, and I offered this amendment, the effect of which, if adopted, would be that the Imperial Valley and the Coachella Valley will not be required to

make payment *for storage waters*. Senator King of Utah, 70 Cong. Rec. 528 (1928). (emphasis added)

In addition to the water charge exemption, § 1 also requires that "expenditures for . . . [the] main canal and appurtenant structures [are] to be reimbursable, as provided in the reclamation law, . . .". This provision for payment of expenditures "as provided in the reclamation law" is similar to requirement in § 4(b) of the Project Act where it is provided that the Secretary is to "make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of . . . [the] main canal and appurtenant structures in the manner provided in the reclamation law." It is hardly likely that the water charge exemption, when standing side by side with the requirement that repayment of construction costs be in the manner provided by reclamation law, was intended to exempt landowners in the Imperial and Coachella Valleys from any legal requirement except as specifically provided.

B. References to public lands in § 9 do not exempt private lands.

Petitioners make a half-hearted argument that the acreage limitation should not apply to private lands because § 9 of the Project Act provides for the disposition of public lands practicable of being irrigated and reclaimed by the project works authorized by the Act. 43 U.S.C. § 617h, Dist.App. 165a; L.Br. 36-37; Dist.Br. 13-14. Petitioners do not bother to explain the nature of § 9 or its purpose. That section says nothing about water delivery although there are many references to reclamation law in this section as elsewhere throughout the Project Act. Petitioners' argument was summarily disposed of by the Ninth Circuit. 559 F.2d at 531-32.

Examination of § 9 shows that it directed the Secretary to withdraw lands capable of being irrigated and reclaimed from entry and authorized reopening them to entry at a later date. Those lands subsequently opened for entry throughout the area serviced by the Project Act (not limited to the Imperial Valley), were to be in tracts in various sizes to be determined by the Secretary, with no tract larger than 160 acres. An exclusive entry preference was granted to veterans for a period of three months, subject to the qualifications of 43 U.S.C. § 433.

Petitioners' argument is that the references in § 9 to the acreage limitation being applicable to public lands means Congress "gave thought about the extent that it wanted acreage limitation to be applicable under the Project Act". L.Br. 36. As noted by the Ninth Circuit, landowners are reading too much significance into § 9's reference to the limit of 160 acres for tracts opened on public lands as well as to the other numerous matters referred to in that section. Reference to a 160 acre limit on tracts of public land merely limits the Secretary of the Interior's discretion in determining tract sizes. Otherwise, § 9 requires the opening of public lands for entry "in accordance with the provisions of the reclamation law"—a general reference to reclamation law similar to the general reference in § 14. Similarly, the exclusive preference given to veterans by § 9 has no counterpart in the general homestead laws, as incorporated into the reclamation law by 43 U.S.C. § 432,[125] so this preference had to be qualified by a specific reference to 43 U.S.C. § 433.

[125]The time limit on preferences when the Project Act was passed was, in the discretion of the Secretary of the Interior, 90 days or more. See 42 Stat. 358 (January 21, 1922), later codified without relevant change as 43 U.S.C. § 185. Section 9 of the Project Act limits the preference period to exactly three months. (Except for lands in Alaska, the homestead laws were repealed effective October 21, 1976, by Public Law 94-579, Title VII, § 702, 90 Stat. 2787).

As the court succinctly observed, to use these two minor qualifications by reference in § 9 to create an exemption for private lands from the excess land laws in face of the strong national policy of generally enforcing these laws, the specific incorporation of reclamation law in § 14 and the lack of any specific exemption from the operation of the excess land laws in the Project Act, puts a far too strained reading on § 9 which cannot be accepted. Petitioners do not attack this part of the Ninth Circuit's opinion.

C. Section 4(b) is not an express exemption from reclamation law.

The Project Act was multi-state in nature and because of the size of the project, Congress provided in § 4(b) that the Secretary was required to obtain a repayment contract prior to the appropriation of funds for construction instead of contracting before the delivery of water, as provided in § 46 of the 1926 Act. Although § 4(b) was, by its very terms, to require the repayment contract to conform to reclamation law, landowners contend that the reference to reclamation law is meaningless and that the slight variation in the contracting procedure constitutes an express exception within the meaning of § 14 of the Project Act. The flexibility granted the Secretary in making provisions for repayment under § 4(b) is quite obviously designed to give him greater latitude in obtaining repayment for the huge expenditure of public funds. There is absolutely no language in § 4(b) (or elsewhere in the Project Act, for that matter) which may reasonably be considered to exempt the landowners in the Imperial Valley alone from complying with reclamation law. Congress has provided clearly defined exemptions in other circumstances, and could have done so with respect to the Project Act if that was what Congress intended. As noted by the Ninth Circuit, the

Project Act's modification of § 46 "deals only with the time for securing repayment and does not mean that all other substantive provisions of Section 46 are incompatible with the Project Act". 559 F.2d at 530. If the Secretary "otherwise" secures repayment under petitioners' theory, § 4(b) still requires that repayment be done "in the manner provided in the reclamation law".

D. Landowners have rendered § 14 meaningless.

Landowners are seeking to have § 14 of the Project Act considered as meaningless surplusage. L.Br. 39-42. Other references to reclamation law in the Project Act did not negate the implication of § 14, but emphasized its importance. Since landowners cannot point to an express exemption, they are seeking to establish an implied exemption but to no avail.

The language in § 14 is not unique. Its references to the requirement that reclamation law is to govern the "construction, operation, and management" of the project works is not capable of being interpreted to exclude the acreage limitation. Similar language is found in the enabling legislation for the Central Valley Project in California, the Rivers and Harbors Act of August 26, 1937, 50 Stat. 850, as amended by the Act of October 17, 1940, 55 Stat. 1199. Section 2 of the 1937 Act, provides in part:

> . . . except as herein otherwise provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project. . . .

Section 2 of the 1940 Amendment to the Central Valley Project Act adds authority to construct distribution systems "under the provisions of the Federal reclamation

laws". The language in each instance is substantially the same as that in Section 14 of the Boulder Canyon Project.

The Court found this language sufficient in *Ivanhoe* to represent a Congressional mandate requiring compliance with the acreage limitation. It is directly contrary to landowners' claim that these terms had no reference to the use and distribution of project water in the Imperial Valley.

If Section 14 applied only to unspecified "business and fiscal aspects of project management and not to matters of social control, such as acreage limitation, governing water deliveries" (L.Br.40), it would have been a simple matter for Congress to say that in plain terms. Instead, Congress used terminology in § 14 almost identical to that in the Central Valley Project Act. Similar language appears in Section 8 of the Flood Control Act of 1944, 58 Stat. 891, 43 U.S.C. § 390, ". . . the Secretary of the Interior is authorized to construct, operate and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof, or supplementary thereto)," The latter was held to require compliance with the reclamation laws. *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1096 n 4, 1118. Petitioners have not pointed to a single instance where similar language in a project-authorizing statute has been accorded the limited interpretation suggested here.

In a footnote, landowners run the gamut through §§ 10, 5, and 8 of the Project Act in search of the elusive exception negating § 14. These various references throughout the Project Act were considered by the court of appeals as nothing more than a reflection of the fact that the Imperial Valley did not have to fully repay the United States for the benefits received under the Project Act, but that repayment contracts for the benefits that did have to be reimbursed still had to be in accord with the reclamation law.

559 F.2d at 531. The landowners have not demonstrated any error in this analysis.

E. The satisfaction of present perfected rights is not an indirect exemption from the acreage limitation.

The alleged inconsistency of § 6 of the Project Act with § 14, and therefore, § 46, is the heart of petitioners' case. The concept of present perfected rights has its source in Article VIII of the Colorado River Compact. Dist.App. 168a. Before delving into an analysis of this claim, a few preliminary matters should be considered.

Nobody involved in the administration of the Project Act ever considered the possibility that § 6 was in conflict with § 46. The entire cast of characters in the drama of the closing days of Secretary Wilbur's term of office, Messrs. Ely, Dent and Coffey, made no mention of it and apparently did not even consider § 6 to be of sufficient relevance to discuss it among themselves before preparing the letter for the Secretary's signature. Attorney Childers of the Imperial Irrigation District did not mention § 6 when he requested a favorable ruling from the Solicitor. Neither the parties in *Hewes* nor the opinion of the superior court made any reference to present perfected rights. B.P. King, the Staff Attorney with the Bureau of Reclamation in Billings, Montana, upon whose analysis petitioners place such heavy reliance, said nothing about § 6. Surely, if the concept of present perfected rights was in direct conflict with the anti-monopoly provisions of reclamation law, at least one, if not all of the officials who considered the question, as well as the attorney for the District, would have mentioned it.

It will not do to obfuscate this glaring shortcoming in the administrative history of the Project Act as did petitioners when seeking the grant of certiorari. The landowners suggested that present perfected rights is a considera-

tion only because of this Court's mandate in *Arizona v. California*. L.Reply Br. 2. The District stated that the reference to "vested rights" is a secret code for present perfected rights and was therefore sufficient. Dist.Reply Br.6. But this Court did not originate the concept of present perfected rights. Its source is in Article VIII of the Compact, approved by the Commissioners in 1922 at Santa Fe and by Congress when it enacted the Project Act in 1928. It became effective when President Coolidge proclaimed the Project Act effective on June 25, 1929. The "vested rights" referred to in the Wilbur letter did not purport to rely on § 6 or any other section of the Project Act. The letter relied upon an erroneous view of the then applicable administrative practice regarding "vested rights" and, presumably, there would have been no hesitation to rely on § 6 to assist the District if that section was deemed relevant.

The first mention of present perfected rights in the administrative history occurred when Solicitor Barry filed his Opinion in 1964. In the course of his analysis of the language of the Project Act, he referred to § 6 and its requirement for satisfaction of present perfected rights and concluded that it could not be read as insulating the lands in the District from the acreage limitation. 71 I.D. 511, Con.App. 199a. The subject was then raised by the landowner-petitioners, for the very first time, in a meeting on October 1, 1965 between Solicitor Barry and attorneys Warren M. Christopher and Allyn Kreps, representing the excess landowners of the Imperial Valley. Messrs. Christopher and Kreps requested an opportunity to submit a memorandum to Solicitor Barry concerning the conclusion of his opinion. Pl.Exs. 51, 52. The memorandum was submitted by the landowners' attorneys and raised the issue of § 6. Pls.Exs. 55, 56, 57.

Individual water rights have never been adjudicated by this Court in the *Arizona v. California* litigation. In the supplemental decree issued January 9, 1979, 439 U.S. 419, it was decreed, by stipulation, that the Imperial Irrigation District would have present perfected rights in annual quantities not to exceed 2,600,000 acre-feet of diversions from the main stream, or the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres, and for the satisfaction of related uses. There is nothing in the decree that states, specifically or otherwise, that the water may be delivered free and clear of the requirements of reclamation law. The decree does not specify the particular 424,145 acres for which the water is to be delivered. The District's assertion that the court of appeals decision means that the Secretary will deliver much less than the decreed quantity to irrigate less than the decreed area, is pure sophistry. When the District complies with § 46 by requiring the landowner-petitioners to execute recordable contracts, water deliveries will continue as at present. When the sales of excess lands actually take place, the identical quantity of water will be delivered to the District for the identical number of acres. If an excess landowner declines to execute a recordable contract and allows his excess lands to revert to desert, he will not be entitled to water deliveries for his excess acreage and nothing in this Court's most recent decree provides otherwise.

Section 6 of the Project Act does not specifically provide that individual water rights are to be satisfied without respect to § 46. Presumably, Congress could have provided explicitly for an exemption in the Project Act as it did in other reclamation projects having clear, specific exemptions. Since petitioners deny that the Project Act is a reclamation project, they cannot rely on § 8 of the 1902 Act, where it is provided that:

> Nothing in this act shall be construed as affecting or intended to affect, or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act shall proceed in conformity with such laws, and nothing herein shall in any way affect any right or any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream, or the waters thereof; . . . 32 Stat. 390; 43 U.S.C. §§ 372, 383.

Section 8 appears at first blush, as does § 6 of the Project Act and Article VIII of the Compact, to recognize state water rights as being superior to the mandates of federal reclamation law. While some state water policies are recognized as being dominant, this Court recognized in *Ivanhoe* and *California v. United States* that the acreage limitation set out in § 5 of the 1902 Act was an explicit congressional directive indicating that Congress intended state law to control only where not inconsistent with § 5. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 291-92; *California v. United States,* 438 U.S. 645, 668 n. 21, 671-73, 678 n. 31. If § 6 of the Project Act was intended to be a counterpart to § 8 of the Reclamation Act of 1902, the identical principles enunciated by this Court in *Ivanhoe* and *California v. United States* would be applicable. However, a more realistic appraisal is that the concept of present perfected rights was, as determined by the Ninth Circuit, intended to simply indicate that a certain quantity of water is to be provided to the District in recognition of its pre-project appropriations. There is nothing in the legislative history weighing against such an interpretation. As noted by the Court in *California v. United States,* the State of California was an appellant in *Ivanhoe* and, at least at that time, supported a legal position completely at odds with the present position of petitioners, which is adopted by California in its brief to this Court in the present case.

In *Arizona v. California,* the Court held that the Secretary could not be bound by state law in disposing of water under the Project Act where state law is inconsistent with federal law. 373 U.S. at 587. That holding, while dictum, was disavowed in *California v. United States* only to the extent that it would prevent states from imposing conditions on the use of their water by the United States not inconsistent with congressional directives. 438 U.S. at 674. Thus, although the specific question of the purported conflict between present perfected rights and the 160-acre limitation found in § 46 of the 1926 Act and § 5 of the 1902 Act has never been adjudicated, all reported decisions concerning similar conflicts with § 8 have been resolved in favor of the explicit command of § 5.

(i) Nothing in the Colorado River Compact or § 6 of the Project Act suggests the inapplicability of reclamation law

In its Reply Brief filed by the District in support of its petition for certiorari, the District told this Court that "the subject of present perfected rights was never briefed or argued in the Court of Appeals, . . ." (p. 6). Landowners make a similar representation. L.Br. 32. This was obviously a misstatement, for the district court considered present perfected rights to be "repugnant to the concept" of acreage limitation. 322 F.Supp. at 18. The issue was fully briefed in both the District Court and the court of appeals. The court did not manufacture the issue itself in order to decide it.

The Ninth Circuit rejected petitioners' claim that § 6 is an exemption from the acreage limitation, 559 F.2d at

527-530, and the relevant part of its opinion, with footnotes renumbered, is set out at this point.

> Under the Boulder Canyon Project Act, the Secretary of Interior has broad powers to allocate the waters of the Colorado River among the "Lower Basin" states of California, Nevada, and Arizona, and to determine which users within these states will receive water. The Secretary's authority to carry out these allocations is exercised through contracts made pursuant to Section 5 of the Project Act, 43 U.S.C. § 617d. *Arizona v. California, supra,* 373 U.S. at 580. One of the most significant limitations on this allocation power is that the Secretary is "required" by Section 6 of the Project Act to satisfy "present perfected rights in pursuance of Article VIII of said Colorado River Compact." *Id.* at 584. 43 U.S.C. § 617e. Article VIII of the Colorado River Compact provides that "[p]resent perfected rights to the beneficial use of water of the Colorado River System are unimpaired by this Compact."[126] The term "present perfected rights" from the Colorado River Compact is thus incorporated into and made applicable to allocation of water under the Project Act. *Arizona v. California, supra,* 373 U.S. at 566.[127]
>
> The Secretary's contractual powers under Section 5 of the Project Act are also limited by Section 14 of that Act which provides that "[t]his subchapter shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C.

[126]Section VIII of the Colorado River Compact also provides that the rights attached when storage of water reached a certain level. The text of the Compact can be found at 70 Cong. Rec. 324 (1928).

[127]The landowners also claim that Sections 8 and 13(c) of the Project Act make the Colorado River Compact applicable to the Act. However, the references to the Colorado River Compact in Sections 8 and 13(c) were used only to show that the Project Act did not change the Compact's division of water between the Upper and Lower Basins. *Arizona v. California, supra,* 373 U.S. at 566.

> § 617m. It is the landowners' position that the qualifying clause of Section 14, "except as otherwise herein provided", subordinates Section 14 to other specific provisions in the Project Act that conflict with the reclamation laws. They further contend that Section 6 of the Act, in providing for the satisfaction of present perfected rights, necessarily conflicts with the application of excess land provisions of Section 46 and renders the latter provisions inapplicable in the Imperial Irrigation District.[128]
>
> A "present perfected right" is a "water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works" as of June 25, 1929, the effective date of the Project Act. *Arizona v. California,* 376 U.S. 340, 341 (1964).[129] In the case of the Imperial Valley, it therefore becomes necessary to determine the nature of the ownership of water rights under California law.[130] Examination of California law on this point leads to the conclusion that the landowners' argument must be rejected and that satisfaction of present perfected

[128]This argument overlooks the possibility that the Secretary may determine to allocate to the Imperial Irrigation District more water than the amount ultimately determined to be the District's present perfected rights. Water in excess of the District's present perfected rights would not be the subject of Section 6 of the Project Act and would not be protected by that Section from the operation of Section 46.

[129]As is clear from the discussion of Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, and Section 18 of the Project Act in *Arizona v. California, supra,* 373 U.S. at 586-587, not all rights to water under state law control the Secretary's decisions. "Present perfected rights" are thus not the equivalent of all forms of vested rights under state law.

[130]It had been stipulated below by the government that the Imperial Irrigation District possessed present perfected rights, and we see no reason at this point to disturb this stipulation. While the exact quantity of these present perfected rights has not yet been determined, such an exact accounting is not necessary to this argument of the landowners. But, see footnote [128], *supra.*

rights is not incompatible with the application of the excess lands provision of Section 46.

No individual landowner in the Imperial Valley has filed a claim to water from the Colorado River under the terms of the Supreme Court's decree in *Arizona v. California, supra,* 376 U.S. at 351-352, and there are no records of individual claims by Imperial Valley landowners for water rights as of June 25, 1929. Under California law, the Imperial Irrigation District holds legal title to the rights to Colorado River water in trust for the landowners. *Merchants National Bank of San Diego v. Escondido Irrigation District,* 144 Cal. 329, 334, 77 P. 937, 939 (1904).[131] The water rights themselves are not held in trust for any individual landowner. The equitable ownership of the water rights is held in common by all the landowners in the District, *Id.* These principles of ownership have been specifically applied to the Imperial Irrigation District. *Hall v. Superior Court,* 198 Cal. 373, 383, 245 P. 814, 818 (1926).

The concept of an irrigation district's ownership of water rights in trust for the common benefit of landowners within the district is derived from the California doctrine that the use of appropriated water is a public use. Thus, the users of water, the rights to which are held by an irrigation district in trust for the common benefit, do not possess rights to the water that can be considered private property in the ordinary sense of the words, nor do the lands irrigated by that water thereby obtain any absolute right to the continued delivery of water. Landowners within an irrigation district do not possess as part of their freehold estates a proportionate ownership in the water rights owned by the irrigation district. The right of any

[131]Three individuals filed notices of appropriation for the right to divert water for use in the Imperial Valley from the Colorado River between 1895 and 1899. Those notices were assigned to the California Development Company on the date they were recorded. The Imperial Irrigation District subsequently acquired all the assets of the California Development Company except for the latter's agricultural lands in Mexico.

individual landowner to the use of water, which must be a public use, comes about by reason of the landowner's status as a member of the class for whose benefit the water has been appropriated. *Madera Irrigation District v. All Persons,* 47 Cal.2d 681, 691-693, 306 P.2d 886, 892-893 (1957), *reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, supra; Jenison v. Redfield,* 149 Cal. 500, 87 P. 62 (1906).

A consequence of this rule is that no particular landowner or particular piece of land is entitled to use any particular proportion of the water to which the irrigation district owns rights. As new landowners and as new lands come within the jurisdiction of the irrigation district, they are entitled to use their proper share of the water, and the shares of all landowners would have to be redistributed. *Madera Irrigation District v. All Persons, supra,* 47 Cal.2d at 692, 306 P.2d at 893.

It follows that all the present perfected rights owned by the Imperial Irrigation District as of June 25, 1929, are not water rights owned by any particular landowner. Satisfaction of the Imperial Irrigation District's present perfected rights by the Secretary of the Interior in the allocation of Colorado River water therefore only concerns the total quantity of water to be supplied to the Imperial Irrigation District and does not concern supplying any particular amount of water due to any particular landowner. The excess land provisions of Section 46, however, apply only to individual landowners and do not, under the Project Act, apply to the Imperial Irrigation District as the owner of water rights in trust for the common benefit. Excess lands of a particular landowner could be deprived of water without reducing the total amount of water delivered to the Imperial Irrigation District. The District would have to redistribute its deliveries if certain lands became ineligible for delivery of water, but the satisfaction of the District's total present perfected rights would not be impaired by the operation of Section 46. Furthermore, redistribution of deliveries in accord with the excess lands provisions of Section 46 would not violate the trust under which the Imperial

> Irrigation District owns the water rights for the common benefit. *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 712, 3 Cal.Rptr. 317, 329, 350 P.2d 69, 81 (1960). Section 6 of the Boulder Canyon Project Act, therefore, does not preclude application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926.

There is ample support for the decision reached by the court of appeals. The *Arizona v. California* litigation determined the issue of whether or not the apportionment of water related to the mainstream alone, or included the tributaries. In fact, both the special master and the Court treat the Project Act as a reclamation project and make clear that present perfected rights mean only that the State of California, including the Imperial Irrigation District, will be provided with the same quantity of *stored* water that was previously diverted from the mainstream itself. Both the special master and this Court make it clear that they were *not* making a determination of the rights of individual water users in the respective states. "The basic controversy in the case is over how much water each state has a legal right to use out of the waters of the Colorado River and its tributaries." 373 U.S. at 551. The special master declined to determine the rights of competing users within the same state. Report of Special Master 218-19. Paragraph VIII of the Decree provides: "This Decree shall not affect (A) The relative rights *inter sese* of water users within any one of the States, except as otherwise specifically provided herein." 376 U.S. at 352. Thus the compact in no way attempts to regulate the use of water within a particular state. No reference is made in either the Compact, Project Act or this Court's opinion or decree to freeing the individual water users within the basin states of the anti-monopoly provisions of reclamation law because of present perfected rights.

In addition, Secretary of Interior Hubert Work described Article VIII of the Compact as relating to the total volume of water for a state as a geographical area, not for individual water users:

> This appears to afford ample protection and assurance to those States included in the upper division of the watershed against creation of a priority of right through the building of these works, which would impose in any way their right to the *volume* guaranteed to the division in the compact. Letter from Secretary Work to Charles L. McNary, Chairman, Committee on Irrigation and Reclamation, *Hearings on H.R. 6251 and H.R. 9826,* Before House Comm. on Irr. and Reclamation, 69th Cong. 1st Sess., Part 1, p. 8 (1926). LX-DD, D.

The contention that landowners' individual water rights are somehow protected by the Compact is patently without merit. In the years between 1895 and 1899 in the Imperial Valley, notices of appropriation were filed by three individuals for the right to divert 10,000 second feet of water which translates into about 6,500,000-7,000,000 acre feet per year in the Imperial Valley. These individuals, named Rockwell, Gender and Heffernan, assigned those notices to the California Development Company for whom they were principals, on the same date as the recording. 1 CR 12. Even though Rockwood established a claim to 10,000 cubic feet of water per second in 1899, the United States government refused to approve his diversions from the river in 1904. When he filed for his diversions, he overlooked the fact that the government of the United States, as well as that of Mexico, considered the Colorado to be a navigable stream and permission to divert water had to be obtained from the Department of War and he had neglected to do so. In 1903, the reclamation service announced that the California Development Company's diversions were illegal. Hundley, *Water and the West,* 24.

In the Court's supplemental decree of January 9, 1979, 439 U.S. 419, the Imperial Irrigation District is entitled

to annual quantities not to exceed 2,600,000 feet from the mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses. The Court said nothing about individual water rights within the district and did not identify the specific acreage to which the water is to be delivered.

(ii) State water rights do not exclude application of the 160-acre limitation

In their summary treatment of state water rights, landowners suggest that water rights held in trust by an irrigation district under state law are immune from compliance with the acreage limitation. L.Br. 32. There is no such immunity, and the California statute authorizing the District to enter into the All-American Canal Contract explicitly deferred to federal law on matters of distribution and apportionment of water:

> All water, the right to the use of which is acquired by the District under any contract with the United States shall be distributed and apportioned by the district in accordance with the acts of Congress applicable thereto, . . . 1917 Cal. Stat. 245, § 4, now codified in Cal. Water Code § 23200[West].

Many years ago it was recognized that any purported "vested rights" of landowners in the District would have to give way to federal law under the Project Act and the compact. *Greeson v. Imperial Irr. Dist.*, 59 F.2d 529, 532-33 (9th Cir. 1932).

Landowners are literally correct when they state that "acreage limitation has been permitted only where the water right belongs to the Federal government, not the District". L.Br. 32, n 26, citing *Ivanhoe Irr. Dist. v. All Parties*, 53 Cal.2d 692, 704, 350 P.2d 69, 75, 3 Cal.Rptr. 317, 323 (1960). However, they cast the proposition in a misleading fashion, for *Ivanhoe* has been the only case to consider the application of acreage limitation against a claim of state water rights. Furthermore, it is hard to conceive of a dispute over this issue which would not include some reference to state water rights, for most reclamation projects are in areas having previously developed irrigation facilities. The decision in *Ivanhoe* was not based upon the simple proposition that the water rights belonged to the federal government. As Justice Peters put it in the landowners' reference, this Court held that "the Federal government either had title to the water free of trust or could, by direct or inverse condemnation, secure such title." That proposition also applies to the Project Act. The Colorado River is a navigable stream, and the government is in the exact same position with respect to the Colorado as it was with respect to the San Joaquin, Sacramento, and Trinity Rivers involved in the Central Valley Project. Even though Congress elected to recognize state created water rights in § 8 of the Reclamation Act, that recognition does not foreclose application of the acreage limitation. If state water rights are taken or adversely affected by the government in the operation of a reclamation project, either directly or indirectly, the government is subject to a claim for compensation in another forum. *United States v. Gerlach Live Stock Co.*, 339 U.S. 275, 737-39. (1950); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 291. The government may "regulate that which it subsidizes". *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. at 296.

Even under the water law of California, the right of a landowner to the use of water appurtenant to his land is not absolute. His right to use the water may be subject to a tolling charge based on the quantity of water diverted. *Willard v. Glenn-Colusa Irr. Dist.*, 201 Cal. 726, 258 P. 959, 965-66 (1927). He may lose that right upon refusal to pay for its use. *Leavit v. Lassen Irr. Co.*, 157 Cal. 82, 106 P. 404, 409 (1909). His appropriative or

prescriptive right to water matures only when the means of transporting the water to the places used is constructed. *San Bernardino Mun. Water Dist. v. Meeks & Daley Water Co.*, 226 Cal.App.2d 216, 222, 38 Cal.Rptr. 51, 54 (1964). If a landowner's water rights are not absolute property rights under California law, there is no policy requiring that his rights would be greater under federal law.

Landowners' reliance upon this Court's statement in *Arizona v. California* that the guarantee of § 6 was a matter of "intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective" (376 U.S. at 584), is misplaced. L.Br. 33. That comment was made immediately following a discussion of the Secretary's obligations to apportion water among the various states. There is not a single word in any of the *Arizona v. California* opinions or decrees denying the application of the acreage limitation. It is the landowners, not Congress or the court of appeals, that is playing word games. If Congress had intended to pass legislation which would excuse a handful of individuals, partnerships and corporations owning more than a quarter million acres of land from the important national policy, it would have and could have done so explicitly, rather than resorted to the "word games" alluded to by landowners.

II. THERE IS NOTHING IN THE LEGISLATIVE HISTORY TO INDICATE THAT CONGRESS INTENDED TO EXEMPT THE IMPERIAL VALLEY FROM THE ANTI-MONOPOLY PROVISIONS OF RECLAMATION LAW.

The language of the Project Act is sufficiently clear to enable the Court to determine its meaning. For ambiguities, if any, the *Ivanhoe* rule of construction provides guidance. Since the meaning of the words of the statute is discern-

able, it should be unnecessary to psychoanalyze Congress to determine what it meant but forgot to enact.

Moreover, examination of the legislative history of the Project Act is of academic interest only, for the congressional debates were concerned almost exclusively with the apportionment of water among the basin states and the financial feasibility of the project. After reviewing the many legislative materials submitted by the parties concerning the various Swing-Johnson bills, the Ninth Circuit observed that "the legislative history concerning the acreage limitation provisions of the reclamation laws is relatively meagre. In reviewing this history, it is important to remember that the landowners seek to find in it a specific exemption that can not be found in the actual language of the Project Act." 559 F.2d at 532. Even one of petitioners' champions, former Solicitor General Griswold, concluded that the "legislative history is far from clear, but can be read to provide support for either view. There are clear statements in the legislative history that the 160 acre limit was not involved. These are included in the opinion of the district court. Similarly, there are explicit statements in the legislative history (referred to in Mr. Kashiwa's [Assistant Attorney General of the Lands Division] memorandum) to the contrary. Actually, though, the entire legislative history is extremely complex. It is very hard to have any conviction on that any of these items of legislative history have any close relation to the statute as it was finally enacted." 126 Cong. Rec. S 1632 (daily ed. Feb. 20, 1980). At the same time, the landowners state that examination of the legislative history "shows that the administrative practice initiated by Secretary Wilbur in 1933 faithfully reflected the congressional intent". L.Br. 44. The District tells us that during the ten year legislative history of the Project Act "the subject of acreage limitations was thoroughly debated in the committees and on the floors

of Congress." Dist.Br. 38. Both petitioners are completely wrong, and their briefs are notably lacking in substantial citation to meaningful authority.

The legislative history of the Project Act was scrutinized by the Ninth Circuit during the three and a half years the case was under submission. That history, as summarized by the Court at 559 F.2d 532-36, is a fair narration of the few occasions when the issue of acreage limitation was mentioned and is set out at this point verbatum, except for footnotes which have been re-numbered.

> A series of bills introduced by Congressman Swing and Senator Johnson (both of California) in the 67th, 68th, 69th, and 70th Congresses, and known as the Swing-Johnson bills, culminated in the passage of the Project Act by the 70th Congress in December of 1928. The bills generated a great deal of controversy, especially because of the opposition of Arizona's Congressional delegation. However, despite hearings by committees of both the House and Senate considering each series of Swing-Johnson bills and extensive debates on the fourth and last Swing-Johnson measure that ultimately became the Project Act, the legislative history concerning the acreage limitation provisions of the reclamation laws is relatively meager. In reviewing this history, it is important to remember that the landowners seek to find in it a specific exemption that cannot be found in the actual language of the Project Act.
>
> The relevant legislative history begins with the third series of Swing-Johnson bills introduced during the 69th Congress.[132] A bill introduced by Congressman Swing, H.R. 6251, was referred to the Department of the Interior, redrafted, and re-introduced as H.R. 9826. As redrafted, H.R. 9826 contained a provision identical to that eventually enacted as Section 14 of the Project Act.

[132]The landowners rely on a brief exchange during committee hearings in 1924 on the second Swing-Johnson bill. However, this bill was never reported out of committee.

During hearings on that bill, Congressman Swing informed a House committee that, in his opinion, the bill did not require a private landowner to sell lands in excess of 160 acres at prices to be fixed by the Secretary of the Interior. This statement was not made with reference to any particular portion of the bill. It was accompanied by Congressman Swing's misleading testimony that there were only one or two large landholdings in the Imperial Valley.[133] At the same time, the Commissioner of the Bureau of Reclamation told the committee that the bill permitted landowners to retain their farms intact no matter how large their holdings. However, he added that "old" lands, i.e., lands presently irrigated without the benefit of a federal reclamation project, would be sold water under a Warren contract.[134]

The Commissioner was referring to the Warren Act, 43 U.S.C. §§ 523-525.[135] Under that Act, water stored by a federal reclamation project in excess of the needs of that project could be delivered by contract to an irrigation district. However, that water could not be used "otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects." 43 U.S.C. § 523. Furthermore, the Warren Act, while not including a divestiture provision such as the one in Section 46, does provide that landowners cannot receive water in excess of an amount sufficient to irrigate 160 acres. 43 U.S.C. § 524.

The committee was thus being told by the government agency responsible for drafting H.R. 9826 that there was no applicable divestiture provision for excess lands but that the general language incorporating the

[133]While the average size of an Imperial Valley farm in the 1920s may have been less than 160 acres, there were several over 320 acres. Taylor, *Water, Land, and Environment, etc.*, 13 Natural Resources Journal 1, 4 (1963).

[134]Hearings on H.R. 6251 and H.R. 9826, 69th Cong., 1st Sess. (1926) at pp. 32-33. It should be noted that the Commissioner also testified that there were several large landholdings in the Imperial Valley.

[135]Act of February 21, 1911, ch. 141, 36 Stat. 925.

reclamation law incorporated the Warren Act which did limit the amount of water a landowner could receive.[136] It is significant that these hearings were held in February and March of 1926 while Section 46 was not enacted into law until May of 1926.

After completion of the House hearings, the committee amended H.R. 9826 by adding a specific acreage limitation provision similar to the divestiture provision of Section 46. There is no contemporaneous explanation of the committee's reasons for adding this provision. However, in light of the view presented to the committee that the project to build the All-American Canal was viewed as a "supplemental" one subject only to the restrictions in the Warren Act, the amendment can most reasonably be construed as a decision to add an additional restriction to those already contained in the Warren Act. The bill was reported favorably to the House, but it never came up for a vote.

Meanwhile, a bill sponsored by Senator Johnson, S. 3331, was favorably reported out of committee. Although the committee report did not specifically discuss the acreage limitation question, it did note that a provision in the bill essentially the same as what eventually became Section 14 of the Project Act, made the reclamation law applicable where not inconsistent with other portions of the statute. The report noted that "[i]n a great project as this many details may properly be referable to a general law such as the reclamation act."[137] During the Senate debates on the bill, Senator Johnson emphasized that the bill was to be part of the reclamation law.[138] Although made in the context of assuring Arizona's senators that Arizona's water rights would be protected, it could hardly have escaped the attention of the Senate that by that time the reclamation law also required significant acreage

[136]Congressman Swing's testimony is not inconsistent with that of the Commissioner because the Congressman discussed only divestiture of excess acreage.

[137]Senate Report No. 654, 69th Cong., 1st Sess. (1926) at p. 28.

[138]68 Cong.Rec. 4291-4292 (February 21, 1927).

limitations in its provisions for contracts with irrigation districts. Shortly thereafter, Senator Phipps of Colorado introduced an amendment to S. 3331 and a new bill as a substitute to S. 3331. Both proposals included provisions specifically incorporating acreage limitation provisions similar to Section 46 into the bill's provisions for delivery of water. Neither Senator Phipps' proposals nor S. 3331 were ever the subject of a vote in the Senate.

During the 70th Congress, Congressman Swing and Senator Johnson renewed their efforts. A House bill, H.R. 5773, containing the specific acreage limitation provision previously added by the House committee to H.R. 9826 in the 69th Congress was passed and sent to the Senate. In the meantime, a Senate bill, S. 728, sponsored by Senator Johnson, was being considered by the Senate. It contained a provision identical to Section 14 of the Project Act but did not contain the specific acreage limitation provision found in H.R. 5773. While the Senate version was ultimately adopted, the circumstances surrounding the decision to accept the Senate version do not give rise to a conclusion that the Project Act specifically exempts the Imperial Valley from the application of the acreage limitation provisions of the reclamation law.

Senator Johnson's proposal, S. 728, was considered in committee along with S. 1274, a bill proposed by Senator Phipps. The Phipps bill included an express requirement that acreage limitation provisions be incorporated in water delivery contracts while the Johnson bill contained only the general reference to reclamation law eventually enacted as Section 14 of the Project Act. The Johnson bill was reported to the Senate, but the committee did not report the Phipps bill. The Secretary of the Interior objected to the Phipps bill because of its failure to adequately provide for the development of hydroelectric power, and his objections were incorporated into the report on Senator Johnson's bill. In addition, the Secretary's opinion that the Johnson bill, containing no specific acreage limitation provision, was similar to H.R. 5773, which

did contain such a specific provision, was also incorporated into the Senate report on the Johnson bill.[139]

When S. 728 reached the floor of the Senate, it was the subject of a lengthy filibuster. During the course of the debates, Senator Hayden of Arizona, one of the bill's most ardent opponents, claimed that the bill failed to provide acreage limitations on privately owned lands receiving irrigation water as the House bill did and proposed an amendment that would contain a specific provision comparable to the one in the House bill.[140] This was one of many amendments sponsored by the two senators from Arizona. There was no discussion of the amendment and the Senate never voted on it. The first session of the 70th Congress adjourned in May of 1928 without the Senate ever voting on Senator Johnson's bill.

When the second session of the 70th Congress began in December of 1928, Senator Johnson immediately moved to substitute H.R. 5773, already passed by the House, for S. 728 and then amend H.R. 5773 by retaining only the enacting clause and substituting S. 728 for the body of the bill. Senator Johnson assured the Senate that he wished only to "preserve orderly legislative procedure" and that the two bills contained "like purposes" and "like designs."[141] The Senate unanimously consented to his request. Senator Hayden then made a speech and engaged in an extended colloquy with Senator Johnson and others over what Senator Hayden considered the significant differences between the bill passed by the House and the Senate version which had been substituted for the House bill. It is

[139]Senate Report No. 592, 70th Cong., 1st Sess. (1928) at pp. 30-31. Nevertheless, Senator Ashurst of Arizona attached a minority report that alleged, *inter alia*, that the committee had not included his proposed amendment to the bill that would have added a specific acreage limitation provision. *Id., Minority Views* at p. 26. This problem receives only two brief references in a minority report of some 38 pages.

[140]69 Cong.Rec. 7634-7635 (May 2, 1928). See also 69 Cong.Rec. 9451 (May 22, 1928).

[141]70 Cong.Rec. 67 (December 5, 1928).

noteworthy that at this time Senator Hayden never mentioned the absence of a specific acreage limitation provision as being a significant difference between the Senate and House bills.[142]

During the entire debate in the Senate's second session extending from December 5, 1928, until the Senate passed the bill on December 14, 1928, the acreage limitation issue was mentioned only once. Senator Ashurst complained that the bill allowed irrigation water to be delivered to landholdings in excess of 160 acres.[143] However, he made only a brief passing reference to the issue in a speech opposing the bill that extends over some 32 pages in the Congressional Record.[144] During the Senate debates in December of 1928, several amendments to the bill were brought up for a vote, but there were no votes on amendments that would have added more specific acreage limitation provisions to the bill.[145] Allocation of water from the Colorado River and control of hydroelectric power facilities were the predominant concerns of the bill's opponents. When the House considered the Senate bill and concurred in it on December 18, 1928, there was again no mention of

[142]70 Cong.Rec. 71-81 (December 5, 1928).

[143]70 Cong.Rec. 289 (December 8, 1928).

[144]70 Cong.Rec. 277-298, 314-323 (December 8 and 10, 1928).

[145]The landowners emphasize the origin of Sections 4 and 5 of the Project Act, claiming Congress chose to have Section 5 contracts for the delivery of water be governed by Section 4(a) rather than by a general reference to the reclamation law. In addition, they point out that an amendment to Section 4(b) proposed by Senator Pittman was modified because of Senator Johnson's objections. The modification eliminated requiring delivery of project water in accord with the reclamation laws. See 70 Cong.Rec. 526, 577 (December 13 and 14, 1928). However, the effect of the Pittman amendment was to require the All-American Canal to be paid for under the terms of the reclamation law but without charging for the storage and delivery of the water. See 70 Cong.Rec. 576 (December 14, 1928). The end result was to adopt a provision similar to the proposal of Senator Ashurst cited on page 102 of the Landowners' Joint Consolidated Brief. In any event, as previously discussed, there is no incompatibility between Sections 4 and 5 of the Project Act and the application of Section 46.

the acreage limitation issue or the deletion of the specific acreage limitation by the Senate.

Evaluation of this legislative history does not lead us to conclude that Congress intended to exempt lands receiving water carried by the All-American Canal from the acreage limitations of Section 46. On the contrary, the legislative history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created. Furthermore, the legislative history can be interpreted as giving a positive indication that Congress intended that acreage limitation provisions be incorporated by the general references to reclamation law that were included in the Project Act. A specific acreage limitation was included in the bill sent to the House during the 69th Congress after witnesses at the committee hearings claimed that, as originally drafted, there were no such provisions in the bill. During the 69th and 70th Congresses, the House passed a bill with a specific acreage limitation provision. During the 70th Congress, the Senate was told through a committee report and by the sponsor of the legislation that its bill was substantially the same as the bill passed by the House. There was no objection in the House when it considered the Senate bill with its general incorporation of reclamation law rather than the specific language previously used in the House version of the legislation. All this points to an interpretation opposite to that urged by the landowners.

In support of their position, therefore, the landowners must rely on such evidence as the failure of the Senate committee to adopt Senator Ashurst's proposed amendment or Senator Phipps' proposed bill and the failure of the Senate to adopt Senator Hayden's proposed amendment. However, statutory interpretation cannot rest on unexplained actions of a

Congressional committee.[146] Similarly, we cannot interpret a statute based on inferences the landowners seek to draw from proposed amendments to legislation that were never brought to a vote or even seriously debated on the floor. It could just as reasonably be inferred that the amendments were not adopted because the legislation was considered to have already incorporated the proposed changes. *United States v. Wise,* 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962). Cf. *National Automatic Laundry and Cleaning Council v. Shultz,* 143 U.S.App.D.C. 274, 443 F.2d 689, 706 (D.C. Cir.1971). The landowners also rely on statements of the bill's opponents. This type of evidence may be reliable when circumstances indicate the opponents' statements correctly indicate the views of the bill's proponents, *Arizona v. California, supra,* 373 U.S. at 583 n. 85. However, in this case there is positive evidence that the bill's opponents were incorrect and their objections, at least on the part of Senator Hayden, were not maintained throughout the course of the debates. In view of all the circumstances reviewed above, we cannot rely on a few statements of opponents during the course of lengthy proceedings primarily concerned with other aspects of the proposed legislation as the correct version of the Project Act's legislative history. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 203 n. 24 (1976).

The landowners seek to bolster their argument by claiming that Congress was not concerned with lands already irrigated by private efforts when it passed Section 46. They contend that Section 46 was designed only to prevent speculative profits made on unimproved arid lands that became part of a federal reclamation project. Since Congress was unconcerned with productive lands such as those in the Imperial Valley when Section 46 was passed, their argument goes, Congress was not violating any basic policy when shortly thereafter it exempted the Imperial Valley

[146]To the extent that there is an explanation for any of these committee actions, it is that the Phipps bill was rejected as inadequate for reasons unrelated to the acreage limitation provision.

from the acreage limitations in Section 46. If this interpretation of Section 46 were correct, there would be less of a need to find a specific exemption for the Imperial Valley in the legislative history.[147]

The landowners' interpretation of Section 46, however, is not correct. The statutory language makes acreage restrictions specifically applicable to all private lands receiving water through federal reclamation projects and makes no distinction between lands previously unproductive and lands previous productive because irrigated by non-federal projects. Congress was well aware when it passed Section 46 that many federal reclamation projects were initiated to supplement or replace non-federal irrigation projects, as was done in the Imperial Valley. Section 46 was designed to strengthen both the anti-speculative and anti-monopoly policies of the reclamation laws, and there is no question that Congress intended it to apply to previously irrigated and productive lands such as those in the Imperial Valley. *United States v. Tulare Lake Canal Co., supra,* 535 F.2d at 1112-1113, 1119, 1121 at n. 107, 1132.

It is usually true that most of the land included in a reclamation project is privately owned; it is usually true that the private lands are already under irrigation through facilities developed at private expense; it is usually true that the reclamation project only supplements or regulates existing water supplies.
Id. at 1143.

A. The few excerpts from committee hearings relied upon by petitioners are inconclusive at most.

Out of eight years of legislative proceedings leading up to the final adoption of the Project Act in 1928, petitioners have been able to locate two possible references to the subject of the acreage limitation. Dist.Br. 40-41; L.Br. 44-45. The first reference is to a response from Commissioner Mead who was asked by Congressman Sinnot whether or not H.R. 9826 contained any provision "on a farm unit on the lands to be irrigated", and the Commissioner replied, "As to the old land, it would be sold under a Warren contract." *Hearings on H.R. 6291 and H.R. 9826,* Before Comm. on Irrig. and Reclamation, 69th Cong., 1st Sess. 32-33 (1926). As noted by the Ninth Circuit, at the same time the Commissioner told the Committee that the bill permitted landowners to retain their farms intact, he added that "old land", i.e., lands presently irrigated without the benefit of a Federal reclamation project, would be sold under a Warren Act contract. The court noted that the Commissioner was referring to the Warren Act, 43 U.S.C. §§ 523-525 and, under that Act, water stored by a Federal reclamation project in excess of the needs of that project could be delivered by contract to an irrigation district. However, that water could not be used "otherwise than as prescribed by law as to lands held in private ownership within government reclamation projects". 43 U.S.C. § 523. Furthermore, the Warren Act, while not including a divestiture provision such as the one in § 46 (§ 46 had not yet been enacted), does provide that landowners cannot receive water in excess of an amount sufficient to irrigate 160 acres. 43 U.S.C. § 524. Thus, Commissioner Mead was technically correct in testifying that the owner of "old land" could have been sold water for 160 acres, while continuing to occupy his excess acreage, although his "excess lands" could not receive project water. The substance of his statement leads to a conclusion wholly at odds with that urged by petitioners.

The sum and substance of the "consistent" and "deliberate" purported intention of Congress to exempt the Imperial Valley alone from the acreage limitation is found in a grand total of two words spoken during all of the hearings

[147] The logical extension of this argument would in fact be that acreage limitations would not apply unless Congress specifically mandated such a result.

in the House and Senate and occurred while considering one of the earlier versions of a bill which ultimately became the Project Act. Congressman Swing said, "No sir" when asked whether or not the bill required a landowner to sell his excess lands. As the Ninth Circuit pointed out, this statement was not made with reference to any particular portion of the bill, and was accompanied by Congressman Swing's misleading testimony that there were only one or two land-holdings in the Imperial Valley. 559 F.2d at 532. This statement was made prior to adoption of § 46 of the Omnibus Adjustment Act and at a committee hearing two years before a later version of the Project Act was approved by Congress. When these bills were reported, there was no colloquy on the floor of either house between opponents and proponents of the acreage limitation which indicates that the issue was squarely presented to the Congress as a whole.

Whatever the significance of the statements by Commissioner Mead and Congressman Swing, Secretary of Interior Hubert Work made it clear and unambiguous that the bill before the House Committee at that time (1926), H.R. 9826, would be subject to all of the requirements of reclamation law. In a letter attached to the House committee report on H.R. 9826, Secretary Work viewed the proposed Boulder Canyon Project Act as a "supplemental" water project subject to reclamation law:

> In the sale of water to irrigation districts and municipalities, the provisions of the reclamation act and of the Warren Act would apply. H.R.Rep. No. 1657, 69th Cong., 2d Sess. 22 (1926), Pl. Ex. 68h.

B. The legislative proceedings concerning H.R. 9826 and S. 3331 do not support an implied exemption from the 160 acre limitation.

Landowners have pulled together bits and pieces from the legislative proceedings concerning H.R. 9826 and S. 3331

in 1926. There is no support for their contention that it was "clearly understood" that the acreage limitation could not apply without an express inclusion of that provision in the bill. H.R. 9826 contained, for the first time, a provision making the Project Act a "supplement to the reclamation law, which said reclamation law shall govern the construction, operation and maintenance of the works herein authorized . . ." This language was in § 13 of H.R. 9826, the genesis of § 14 of the Project Act as adopted in 1928. It has been deemed sufficient to require the application of reclamation law, as does similar language generally used in all project bills.

The Senate committee report on S. 3331 specifically provided that reclamation law was to apply to this Project:

> Section 13 [predecessor to Section 14 of the Project Act as adopted] declares the act to be a supplement to the reclamation law, which is made to govern where not inconsistent.
>
> In a great project such as this many details may properly be referable to a general law such as the reclamation act. S.Rep. No. 654, pt. 1, 69th Cong., 1st Sess. 28 (1926).

It is significant that these proceedings concerning H.R. 9826 and S. 3331 occured prior to or contemporaneously with the adoption of § 46 of the Omnibus Adjustment Act, where the details of the acreage limitation are found. If, as petitioners suggest, Senator Phipps truly believed that a specific acreage limitation provision was necessary (L.Br. 47-48), he would certainly have raised the subject on the floor of the Senate and someone would have responded to him. Instead, Congress adopted § 46 in 1926 containing the recordable contract requirement sought by Senator Phipps. It appears that the combination of § 46 and § 14 of the Project Act provided everything he thought to be necessary. Furthermore, Senator Johnson himself inter-

preted this third Swing-Johnson bill on the floor of the Senate by emphasizing the fact that the then pending bill was made subject to the reclamation law. He notably failed to make any mention of a possible statutory exemption for the landowners of the Imperial Valley because of present perfected rights or any other reason:

> Regarding this canal, it may be said: . . . It will through water sales to old and new lands, and the disposal of power or power rights on the canal, repay within a reasonable period all Government advances for its consideration. 67 Cong.Rec. 12622 (1926)
>
> • • •
>
> Under this bill, . . . *we make the entire project a part of the reclamation law. This is a reclamation measure:* and by section 13 of the bill, it is distinctly provided [Section 13 quoted] 68 Cong.Rec. 4291 (1927) (Emphasis added)
>
> • • •
>
> I have called your attention to the fact that this bill is made a part of the reclamation law; . . ." 68 Cong. Rec. 4292 (1927).

Senator Phipps' proposed amendment to S. 3331 never received any consideration in the Senate and never came to a vote. He was apparently satisfied that his amendment was unnecessary.

C. S. 728, neither explicitly nor implicitly, called for an exemption from the acreage limitation.

The progress of S. 728, and S. 1274 authored by Senator Phipps, was analyzed in detail by the Ninth Circuit. 559 F.2d at 534-36. Landowners emphasize that S. 1274 contained an express acreage limitation provision and therefore, they conclude, Senator Phipps and probably the entire Senate did not consider the language of present § 14 to be sufficient to require the application of reclamation law. Landowners do not tell this Court the S. 1274 was not

reported out of committee. The inference they seek to draw from this rejection, that the committee was rejecting inclusion of an acreage limitation provision, finds no support in the record. The failure to report S. 1274 had nothing to do with acreage limitation, but it was objectionable in other respects. In a letter to Senator Phipps from Secretary of Interior Hubert Work, the Secretary reported that he could not recommend approval of S. 1274 because it did not authorize construction of power generating facilities necessary to make the Boulder Canyon Project feasible:

> S. 1274 does not authorize the construction of a power plant and incidental structures suitable for the fullest economic development of electrical energy. The revenue to be derived from the sale of power is necessary to render the project feasible. S. Rep. No. 592, 70th Cong., 1st Sess. 31 (1928)

For this reason, and apparently no other, Secretary Work recommended approval of Senator Johnson's bill, S. 728. In doing so, the Secretary noted that S. 728 was similar to H.R. 5773, despite the fact that the latter contained a specific provision for the 160-acre limitation, while the former did not. It is therefore unlikely that Secretary Work would have considered S. 728 and H.R. 5773 similar if they were in fact, dissimilar, on the very important aspect of acreage limitation. It should be recalled that only two years earlier in his letter attached to the House committee report on H.R. 9826, an earlier version of H.R. 5773, Secretary Work advised the House committee that the provisions of the Reclamation Act would apply under H.R. 9826 which then contained language identical to present § 14.

Thus, the landowners' inference that S. 1274 might have been rejected because it contained a specific acreage limitation provision for private lands is simply not correct. It was rejected because it did not authorize construction

of power-generating facilities without which the Project Act would not be feasible. Neither Secretary Work's views nor the Committee Report disclosed any opposition to imposition of acreage limitations on private lands.

The statements made on the floor by Arizona Senators Hayden and Ashurst during the course of their filibuster (L.Br. 49-50) were not responded to and were apparently not taken seriously by anyone. The comments of Senator Ashurst were made in a passing reference in a speech extending over 32 pages in the Congressional Record. It is indeed a shaky business to rely upon charges leveled at a bill by its principal opponents. The issue was far from "drawn as to whether acreage limitation should be imposed in Imperial Valley" as suggested by the landowners. Rather, it appears to be a classic case of the principal opponents of a bill attempting to talk it to death. Significantly, the issue never came to a vote and there was no response to their charges that the reclamation law would not apply to the Imperial Valley.

Landowners acknowledge, as they must, the observation of the court of appeals that the substitution of S. 728 for H.R. 5773 by Senator Johnson, was represented by Senator Johnson as being similar bills having "like purposes and like designs". L.Br. 50-51. The purpose of substituting S. 728 for H.R. 5773 was explained by Senator Pittman of Nevada. The reason was because of the determination of the Senate to require the cost of constructing the All-American Canal to "be borne exclusively by the land to be benefitted, the same as on any other reclamation project. That [S. 728] is the bill we are considering." 70 Cong. Rec. 230 (1928). Under the House version, the entire cost of the project, not only of the dam and reservoir at Black Canyon, but also the All-American Canal was to

be paid from revenues from power derived from waters impounded behind Boulder Dam. *Ibid.*

> Mind you, as the Senate bill now under consideration eliminates the cost of the All-American Canal as a burden upon the resources received from power . . . 70 Cong. Rec. 231. (Senator Pittman)

As the Senate passed Senator Johnson's motion to substitute S. 728 for H.R. 5773, Senator Norris, no friend of speculators, observed:

> The House bill contains, in effect, the amendment known as the Davenport amendment, which the Senator from Idaho offered and withdrew. In my view of it, that constitutes the principal difference between the House bill and the Senate bill. 70 Cong. Rec. 602

Landowners' reference to Senator Ashurst's statements as to the possible nonapplicability of the 160-acre limitation did not constitute any substantial basis for his opposition to the Project Act. 70 Cong. Rec. 289. Senator Ashurst was concerned primarily with the deprivation of Arizona's share of Colorado River water by California and he offered a total of 90 amendments by the time of the merger of the Senate and House bills. 70 Cong. Rec. 67.

Objections of Senators Hayden and Ashurst were not based upon the purported failure to provide for the 160-acre limitation. As Senator Hayden stated in the very first day of Senate debate in 1928:

> I owe it to the senior Senator from California [Hiram Johnson] to say that I speak for the people of a State who are thoroughly familiar with the Colorado River Problem and who are united in their opposition to the Boulder Dam bill as it passed the House of Representatives. There is not now and never has been any substantial support for that measure in Arizona. Regardless of how they differ on other questions all political parties and every class and character

of the citizenship of that State opposed the House Boulder Dam bill. 70 Cong. Rec. 69.

Senator Hayden said that both political parties in Arizona were united in "resisting the grave injustice which the Boulder Dam bill, as it passed the House of Representatives, does to the State of Arizona." 70 Cong. Rec. 69. Even the specific provision in § 1 of the House bill (H.R. 5773) referring to the 160-acre limitation was not sufficient to satisfy Arizona interests. During the 69th Congress in the first half of 1928, Senator Hayden stated the three primary or fundamental objections of Arizona to the Project Act:

> 1—The bill seeks to use the power of the federal government to coerce a sovereign state to its injury, and to the benefit of another state.
>
> 2—An unjust division of the water of the lower Colorado River Basin.
>
> 3—The absence of a provision for compensation to the States of Arizona and Nevada for the use of their natural resources, their lands, and their waters, for the generation of hydroelectric power. 69 Cong. Rec. 7630.

Once again, landowners place their sole reliance for psychoanalysis of Congress on the charge of the bill's principal opponent, Senator Ashurst of Arizona. The utter lack of merit in landowners' contention is shown by the fact that Senator Johnson was required to obtain unanimous consent for the substitution of H.R. 5773 for S. 728. Unanimous consent was obtained, even from Senator Hayden. 70 Cong. Rec. 67 (1928). Of even greater significance is that Senator Hayden, while urging the adoption of amendments to H.R. 728, said only that the bill was silent on the subject of how much land in private ownership might be irrigated. 69 Cong. Rec. 7634. He did not

state that the reclamation law was inapplicable under S. 728. He had only "expressed doubt as to whether the committee amendments actually accomplished that fact". 69 Cong. Rec. 9451.

When the House took up the Senate amendments to H.R. 5773, Congressman Swing took the floor to explain the Senate amendments. 70 Cong. Rec. 830-31. He made no reference to the deletion of § 1 from H.R. 5773 and no one in the House, either proponents or opponents of the reclamation law, referred to the alleged deletion of the 160-acre limitation from the House bill by the Senate. 70 Cong. Rec. 830-37. The changes made by the Senate, as summarized by Congressman Swing, related to separating the All-American Canal from the rest of the project for purposes of allocating costs and determining repayment; increasing the appropriation for the project; segregating the cost for flood control and providing for repayment of that cost; altering the means for resolving the appropriations of water among the seven basin states under the Colorado River Compact, including the provision that California could obtain no more than 4.4 million acre feet of water a year from the amount appropriated to the Lower Basin; the authorization for a tri-state agreement between Arizona, Nevada and California; and the continuation of the embargo on issuing licenses on the Colorado River. 70 Cong. Rec. 831.

D. Sections 1 and 4(b) did not change the scope of § 14.

Landowners tell us that the "legislative history" of the evolution of §§ 1 and 4(b) confirms that the references to reclamation law contained in these sections were simply intended to specify the financial terms for repayment, and had nothing to do with acreage limitation. L.Br. 51. There is no incompatibility between §§ 1 and 4(b) on the one hand, and the application of § 46 on the other. Both § 1

and § 4(b) refer to some of the financial aspects of the Project Act. Deletion of Senator Pittman's proposed amendment to § 4(b) to require the Secretary to make provision for the delivery of water in accordance with the Reclamation Act is insignificant. It is noteworthy what except for the few lines in the Congressional Record concerning Senator Pittman's proposed amendment, the record is silent as to any detailed consideration of it. It was never called up for debate.

III. THE ADMINISTRATIVE PRACTICE DOES NOT OUST THE COURTS OF JURISDICTION TO DECIDE HIS CASE ON ITS MERITS.

Petitioners contend that the government's failure to enforce the law entitles the excess landowners of the Imperial Valley to receive the water subsidy until the end of time. The implications of petitioners' contention are far reaching. Moreover, their reasoning, if upheld, would allow the inconsistent administrative interpretations in the Imperial and Coachella Valleys to continue in perpetuity. The significance of nonenforcement of the reclamation law was recognized long ago by Professor Taylor:

> The benefits of administrative nonenforcement were realized by opponents of the excess land law on some older projects such as Salt River Valley, Arizona, and the Imperial Valley Division of the All-American Canal. Once nonenforcement had been achieved, they advertised it repeatedly as a sort of "precedent", arguing from it that there should be no law at all. *Taylor, The Excess Land Law: Execution of a Public Policy,* 64 Yale L.J. 477, 503.

Both the district court and the court of appeals rejected the suggestion that the courts were ousted from their constitutional function of interpreting our laws because of the Wilbur letter. The district court said: "If Secretary Wilbur was wrong, then he defeated a Congressional mandate extensively developed in reclamation law." 322 F. Supp. at 16. The court of appeals considered it to be a "rather simplistic analysis not contained in a formal opinion" and "an informal opinion reached under circumstances indicating a lack of careful consideration". 559 F.2d at 539. The panel rejected the efforts of petitioners to elevate the legal conclusions of the Wilbur letter into the binding force of law. *Ibid.*

The court of appeals carefully analyzed the administrative practice of the Department of Interior. 559 F.2d at 536-40. It found that the only legal analysis of the Department of Interior supporting petitioners' contention was the two and one-half page informal Wilbur letter itself. The Department of Interior began to have its own doubts about the letter's conclusions shortly after water deliveries began in the 1940's, but "continued to adhere to the practice of non-enforcement of acreage limitations in the Imperial Valley because of its previous practice of non-enforcement" until the legal validity of the conclusions in the Wilbur letter were specifically rejected and "thorough and comprehensive opinion by Solicitor Frank J. Barry . . . prepared in response to Congressional inquiries in 1961 and 1964". *Id.* at 539. The court declined to defer this type of administrative practice:

> It is true that in practice, the Department of the Interior did not enforce the 160-acre limitation on lands in the Imperial Irrigation District. This inaction was based at first on the Wilbur letter, which was itself an informal opinion that is legally incorrect and that does not even deal with the reclamation statute at issue in this case. Sometime thereafter, the Department of the Interior abandoned justifying its inaction on the analysis contained in the Wilbur letter, but instead decided against non-enforcement of the 160-acre limitation because it had not been enforced before. Inaction based on previous inaction can not be elevated

into an administrative determination to which the courts should defer. 559 F.2d at 540.[148]

The District attacks the court of appeals for its "ludicrous" conclusion that the Wilbur letter was erroneous. Dist. Br. 58. Yet the District does not make any effort to refute the court's characterization of the letter as a "rather simplistic analysis". Instead, the District's argument actually confirms the view of the panel, for it completely fails to cite any significant legal analysis of the underlying substantive issue supporting the letter and simply recites a number of incidents of non-enforcement. The District's reliance upon the unquestioned principles in this Court's opinion in *United States v. Northern Pacific Railway Co.*, 242 U.S. 190, 195 (1916), that our government should be one "of written laws rather than one of official grace" (Dist. Br. 59) does not support petitioners, but succinctly summarizes the entire thrust of the court of appeals decision.

Rather than defending the Wilbur letter on its merits, the District attempts to sidestep its shortcomings as analyzed both by the court of appeals and Solicitor Barry, by its reliance on an out-dated regulation which is inapplicable by its plain terms. The District claims that Secretary Wilbur was required to rule as he did (and presumably without the necessity of obtaining an opinion from his Solicitor), by reason of the Department of Interior's 1910 regulation found in 43 C.F.R. § 230.70. Dist.Br. 66-67. The landowners are less emphatic and do not argue that the regulation has the effect of law. L.Br. 34.

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[148]The panel's determination was based upon rulings of this Court holding that administrative practice contrary to the law may be overturned no matter how long standing. *Baltimore & Ohio R. Co. v. Jackson*, 353 U.S. 325 (1957); *United States v. E.I. duPont deNemours & Co.*, 353 U.S. 586 (1957).

The very language of the regulation itself provides that a vested water-right *may* be recognized "under appropriate regulations and charges". There is no evidence in the record that the government ever adopted any regulations or charges under this regulation concerning the Imperial Irrigation District. In fact, § 1 of the Project Act specifically provides that there was to be no charge for water in the Imperial and Coachella Valleys.

More importantly, the 1910 regulation has no relationship to reclamation projects authorized after enactment of Omnibus Adjustment Act of 1926. Where applicable, it applies solely to the water-right application system first established under the 1902 Act, later made optional by the Irrigation District and Farm Loan Act of May 15, 1922, 42 Stat. 541, 43 U.S.C. § 511, and finally superseded as to future projects by § 46 of the 1926 Act. The latter provided a mandatory form of joint liability repayment contract provided for in the Project Act and other subsequent federal reclamation projects.

The legal reasoning and substantive conclusion of the Wilbur letter was rejected each and every time it was considered by legal officials in the Interior Department. (Solicitors Harper and Barry) and the Justice Department (Solicitor General Rankin). Even Solicitor General Griswold did not indicate he agreed with the Wilbur letter when making his determination not to appeal the decision of the district court against the recommendations of three members of his staff and the Assistant Attorney General of the Lands Division. No official of the government upon whom petitioners rely in their recitation of the administrative history made any effort to provide legal justification for the conclusion of the Wilbur letter.

At trial, Mr. Weinberg, the government's expert witness on the administrative practice of the Reclamation Act,

explained, in careful detail, the erroneous statements of past practices and procedures described by Secretary Wilbur. 2 Tr. 92:18-117:2. Petitioners offered no evidence to refute Mr. Weinberg. The court of appeals reviewed the administrative history and found that the only legal analysis of the Department of Interior which supports petitioners' interpretation of the Project Act is the Wilbur letter itself. 559 F.2d at 539. The administrative practice was not based on any legal analysis, but on previous inaction. 559 F.2d at 540. Petitioners do not point out any error in this conclusion. In fact, Northcutt Ely, while advocating repeal of the 160 acre limitation for the Central Valley Project before a Senate committee eleven years after he assisted in the drafting of the Wilbur letter, testified that the 160 acre limitation simply "has been ignored" in the Imperial Valley. *Hearings on H.R. 3961,* Before Senate Commerce Sub-Comm., 78th Cong., 2d Sess. 632 (1944). A few years later, Mr. Ely recognized the uncertainty in the legal situation when he testified before another committee: "Under the [All] American Canal, there is some question as to what the ultimate solution will be." *Hearings on H.R. 6335,* Before Senate Sub-Comm. on Appropriations, 79th Cong., 2d Sess. 1109 (1946). "Inaction based on previous inaction" (559 F.2d at 540) does not give rise to the estoppel-like results in the cases relied on by petitioners such as *Udall v. Tallman,* 380 U.S. 1 (1965), *Power Reactor Co. v. Electricians,* 367 U.S. 396 (1961) and *United States v. Midwest Oil Co.,* 236 U.S. 459 (1915). The Department of Interior changed its practice in 1964 when Solicitor Barry filed his Opinion. It is clearly the responsibility and obligation of government officials charged with administering the statute to change an earlier erroneous decision or interpretation after full and careful legal examination and analysis. *F.P.C. v. United Elec. Co.,* 381 U.S. 90, 110, n. 30, 113 (1965).

Petitioners attribute a status to an agency's administrative practice never accorded by this Court. While the interpretation given a statute by those charged with its application and enforcement is generally entitled to considerable weight, it hardly is conclusive. *United States v. Missouri P.R. Co.,* 278 U.S. 269, 280 (1929); *County of Marin v. United States,* 356 U.S. 412, 420 (1958). This Court has taken note of the cases relied on by petitioners and observed that departmental construction "is only one in-put in the interpretational equation" and, more importantly, it carries most weight "if such construction enhances the general purposes and policies underlying the legislation". *Zuber v. Allen,* 396 U.S. 168, 192-93 (1969). The 160 acre limitation "is, in every respect, the most important part of reclamation law". Sax, *Federal Reclamation* 2 Waters and Water Rights § 120, p. 200 (1967). This Court has held that the acreage limitation "is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects". *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 291. The mandatory nature of the acreage limitation was recently affirmed and concurred in by all members of the Court. *California v. United States,* 438 U.S. 645, 667 n. 21, 671.

Secretary Wilbur's letter-ruling is in direct conflict with the Congressional mandate and the national policy of the Reclamation Act to create, encourage, and maintain small, family sized farms. An administrative practice can not thwart the plain purpose of a valid law. *United States v. City and County of San Francisco,* 310 U.S. 16, 31-32 (1940). The Wilbur letter, considered hopelessly deficient in every subsequent legal analysis and in direct conflict with the purpose and policy of the Reclamation Act, is not entitled to any deference as a proper construction of the Project Act and reclamation law. *Cf. General Electric Co. v. Gilbert,* 429 U.S. 125, 141-142 (1976); *Shea v. Vialpando,*

416 U.S. 251, 262 n. 11 (1974); *Zuber v. Allen, supra,* 396 U.S. at 192-93; *Piper v. Chris-Craft Industries Inc.,* 430 U.S. 1, 41 n. 27 (1977). It is a long and well-established principle, not open to serious dispute, that it is the duty of the courts to rule on the applicable law (*United States v. Des Moines Navigation and R. Company,* 142 U.S. 510, 527 [1892]), and that if a ruling by an administrator is plainly erroneous, it is the duty of the Court to give effect to the will of Congress. *Hewitt v. Schultz,* 180 U.S. 139, 156 (1900). No administrator has authority to repeal an act of Congress. The reasonable basis test of the construction of a statute by an agency, argued so vehemently by petitioners, is not conclusive. Courts are not required to stand aside and rubber stamp administrative decisions deemed inconsistent with a statutory mandate or those which frustrate the congressional policy underlying a statute. *Volkswagenwerk v. FMC,* 390 U.S. 261, 272 (1968).

A. Congressional knowledge does not ratify an erroneous administrative ruling and result in a rewriting of the statute.

Petitioners' contention that Congress ratified the erroneous administrative construction of the Project Act by Secretary Wilbur is based on the erroneous assumption that Congress repeatedly considered and approved Secretary Wilbur's interpretation. This Court has warned that it is a "shaky business" to attribute significance to the inaction of Congress. *Power Reactor Development Co. v. Electricians, supra,* 367 U.S. at 408-09. Petitioners are met at the outset with the fact that this case arose out of the Barry Opinion which was a direct result of an inquiry by Senator Clinton T. Anderson, Chairman of the Senate committee having jurisdiction over the reclamation program. Quite obviously, Senator Anderson did not have the "knowledge" petitioners attribute to Congress. In addition, Senator Kuchel, Senior Senator from California and

a member of the Sub-Committee on Irrigation and Reclamation, was apparently equally ignorant of the state of the law in the Imperial Valley, for it was his pointed questioning which jarred the Solicitor's Office to begin work on their response to Senator Anderson's inquiry. In the congressional hearings collected by the District (Dist. Br. 61-63), Congress did not deal directly and was not directly confronted with the question of applicability of the acreage limitation in the Imperial Valley, with two exceptions: *Acreage Limitations in Bureau of Reclamation Projects,* Hearings Before Sub-Comm. on Public Lands and Resources of Sen. Comm. on Energy and Natural Resources, 96 Cong., 2d Sess., Part 3 (1978) and *Reclamation Reform Act of 1979,* Hearings Before Sub-Comm. on Energy Research and Development of Sen. Comm. on Energy and Natural Resources, 96 Cong., 1st Sess. (1979). In the latter set of hearings, the issue was directly confronted and the Senate thereafter gave petitioners the relief they seek in this Court by amending the Reclamation Act to specifically exempt the Imperial Valley. S. 14, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. S-12594 (*daily ed.* Sept. 14, 1979). It is significant that petitioners acknowledged before Congress the need for a specific exemption from the Reclamation Act and addressed their plea to the appropriate forum.

The court of appeals rejected the argument of congressional ratification. 559 F.2d at 540-541. The court observed that many of the references in the committee hearings relied upon petitioners' were brief references to the situation in the Imperial Valley and contained lengthy considerations of completely different reclamation projects. The request for specific exemptions in other areas was attempted by using the Imperial Valley situation to persuade Congress to provide an exemption elsewhere. The court concluded that rejection, or even acceptance of an exemp-

tion claim for another project hardly amounts to deliberate congressional consideration of the situation in the Imperial Valley. The same holds true for brief references to the Imperial Valley and government reports sent to congressional committees.

The best evidence petitioners can muster on this argument concerns the 1958 hearings before the Sub-Committee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs reviewing the acreage limitation provisions in the reclamation law. *Acreage Limitation (Reclamation Law) Review: Hearings on S. 1425, S. 2541, and S. 3448*, Sub-Comm. on Irrig. and Recl. of Sen. Comm. on Interior and Insular Affairs, 85th Cong. 2d Sess. (1958). As the court of appeals noted, the sub-committee was concerned with the future shape of the reclamation law in general and the application of the acreage limitation to a small number of new projects in particular. It was not concerned with legislation for the Imperial Valley. The situation in the Imperial Valley in the Wilbur letter was brought to the sub-committee's attention by counsel for the District who testified shortly after appearing before the Supreme Court in the *Ivanhoe Irrigation District v. McCracken* litigation. His testimony echoed the theory concerning vested water rights that was ennunciated by the California Supreme Court in the *Ivanhoe* cases and later rejected by this Court. These circumstances cannot amount to congressional ratification by silence with respect to the Wilbur interpretation, and significantly, the Chairman of the Sub-Committee was Senator Anderson, who later initiated the Interior Department's review that culminated in the Barry opinion rejecting the Wilbur interpretation.

Petitioners' reliance on the fact that Congress has made repeated appropriations concerning various aspects of the Project Act is also misplaced, for only recently this Court held that continued appropriations by Congress does not

justify ignoring the ordinary meaning of plain language and cannot be interpreted to mean congressional advice to ignore provisions of the law. *T.V.A v. Hill,* 437 U.S. 153, 173, 189 (1978). To do so would be to foster a repeal by implication which is not favored. *Id.* at 189. Since there is no clear repugnancy between any substantive part of reclamation law and the Project Act or between § 14 and § 6 of the Project Act, it cannot be assumed that members of Congress exhaustively reviewed the background of every authorization before voting on an appropriation. *Id.* at 190. Petitioners' argument presented in this case is virtually identical to that rejected in *T.V.A. v. Hill,* although representative of the view of the minority. *Id.* at 200-02.

Finally, without going into unnecessary detail in this brief on matters amply covered by the court of appeals' opinion, the fact of the matter is that it is hardly likely that Congress knowingly permitted and approved the inconsistent administrative interpretations concerning the Imperial Valley and Coachella Valley. Both valleys are treated identically in the statute. If, in fact, there were any significant differences which warranted different treatment, Congress would have specifically provided for those unusual circumstances at some point during the eight years when the Project Act was under consideration.

IV. NEITHER RES JUDICATA NOR FULL FAITH AND CREDIT BARS RESPONDENTS FROM PURSUING THE APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT.

Subsequent to the decision in *Hewes,* there have been many administrative and judicial determinations under the Reclamation Act of 1902 and its various supplements, including the Project Act. These determinations, described previously throughout this brief, were both consistent with

national reclamation policy and uniformly inconsistent with the superior court judgment and the Wilbur letter from which it drew its inspiration.

Landowners have misstated the record when they report that the contract validated in *Hewes* "accurately expresses the intention of the parties that acreage limitation would not be imposed". L.Br.56. Their reference to the testimony of Mr. Weinberg (3 Tr. 221, 240-41) does not support their claim. Mr. Weinberg testified that the contract contains a reference to the reclamation laws which in turn reflected the intention of the signers of the contract for the United States and the District. He denied that the contract binds the United States to ignore the excess land law requirements. 3 Tr. 241:20-242:5.

Any suggestion that the voters of the Imperial Valley relied on or were misled by the *Hewes* judgment or the Wilbur letter finds no support in the record. The voters of the Imperial Valley voted to affirm the contract 4,947 against 729. LX-BC 14. The election was held January 12, 1933. LX-BC 11. This was almost six months before the superior court judge signed the findings, conclusions and judgment on July 1, 1933. LX-BC 32, Dist.App. 120a, 153a. It is thus readily apparent that the decision of the court of appeals does not "create an entirely different contract" as charged by the landowners. L.Br. 57. It is both inaccurate and misleading for the landowners to infer that a new election of the voters would have been required if reclamation law applied to the contract. L.Br. 63, n.43. Secretary Wilbur did not write his letter until February 24, 1933, 6 weeks after the election was held and *Hewes* was not tried until March 16, 1933 (Dist. App. 121a) and not decided until May 24, 1933. L.Br. 133a. The *Hewes* judgment was not the basis for voting either way on the contract. The contract voted upon and litigated in 1933 is the same contract under consideration before this Court. The application of reclamation law to Project Act has nothing to do with confirming the validity of the contract. The question of rights and duties under the contract was not for the superior court to determine. That question is for this Court to decide, whether it be the government or respondents who frame and present the issue.

The court of appeals decision, if upheld, would have the identical effect on the District and the All-American Canal contract that would have resulted had the government either prevailed at trial or not abandoned the case on appeal. Both the government and respondents sought to have the benefits of the project go to the beneficiaries intended by Congress. No challenge has been made by either the government or respondents to the validity of the contract, the only issue properly decided by the superior court. Pursuing the appeal by respondents has subjected excess landowners of the Imperial Valley to no legal disabilities other than those present when the government was a party. If refusal to consider the *Hewes* case preclusive has an effect on principles of federalism (a contention respondents deny), that effect is no greater than what was to be expected when the government filed suit. The *Hewes* judgment was not binding on the government because of sovereign immunity. It is not binding on respondents for the many reasons which follow.

A. The *Hewes* case was not a true adversary proceeding and its judgment is not entitled to *res judicata* recognition.

Petitioners dispute the panel's decision on the grounds that the ruling on federal reclamation law in the *Hewes* case was not pure dicta but was the very substance of the decision. They attribute the determination concerning the acreage limitation to be of substance because it was put in issue by Malan and therefore properly decided. If peti-

tioners are correct, there would be no limit to the mischief available to parties seeking to frustrate this and other statutes. The court of appeals recognized the danger of a collusive suit when it declined to determine whether or not respondents were interested parties in the *Hewes* litigation so that they would be bound by the decision of the superior court, in view of the fact that neither of the parties litigating that issue wished to see the acreage limitation applied in the Imperial Valley. 559 F.2d at 526, n. 31.

A review of the record of the *Hewes* case shows that there was no true adversity between the District and Malan on the acreage limitation question. Neither party wanted the anti-monopoly provisions of reclamation law to apply. In fact, the District's attorney, Mr. Childers, sought a formal Solicitor's opinion to that effect. Malan did not want to sell his excess lands. Both were satisfied with the superior court's judgment and Malan did not pursue his appeal. The record shows that the District and the government were anxious to start construction of the All-American Canal and the Comptroller General would not appropriate the first installment of $6,000,000 to begin construction of the All-American Canal until the confirmation of the contract was final. There is no reference in any of the government records following the rendition of the judgment in *Hewes* that anyone gave any consideration to the acreage limitation question decided in that case. LX-BH, BI, BJ, BL. Malan's attorney provided a copy of his appellate brief to Secretary Ickes. LX-BK. Reference to the reclamation law was one small part of a shot-gun blast in Malan's brief at the alleged invalidity of the contract. *Id.* at 18-19. There is no indication that the Secretary saw the correspondence from Malan's attorney and it was routinely referred to the District Counsel of the Bureau in Los Angeles. *Id.*, 3rd unnumbered page. The record does not show why Malan dismissed his appeal, but it takes little

imagination to realize that his interest and that of the District were identical in their desire to have a determination that the acreage limitation not be applicable to the contract.

The inference to be drawn from all the surrounding circumstances (Mr. Childer's request for a Solicitor's opinion, Executive Assistant Ely's change of opinion concerning the applicability of the acreage limitation, Assistant Commissioner Dent's new revelation about "vested rights", the hurried preparation of the Wilbur letter without study or a Solicitor's Opinion and the dismissal of Malan's appeal) is that the parties sought to obtain a binding opinion on the Project Act to foreclose a full examination of the underlying legal issue. The federal courts are not required to follow non-adversary decisions of either federal or state courts. *Aerojet General Corporation v. Askew,* 511 F.2d 710, 720-21 (5th Cir. 1975) *reh. den.,* 514 F.2d 1072 (1975), *cert. denied,* 423 U.S. 908 (1975). *Cf. Lord v. Veazie,* 49 U.S. (8 How.) 251, 255-56 (1850); *United States v. Johnson,* 319 U.S. 302 (1943); *Chicago and G.T. Ry. Co. v. Wellman,* 143 U.S. 339, 344-45 (1892); *Chamberlain v. Cleveland,* 66 U.S. 419 (1862). To do so would pose a grave risk of violating due process. *Cf. Hansberry v. Lee,* 311 U.S. 32 (1940).

B. Congress did not intend confirmation proceedings to be a vehicle for obtaining judicial determinations on federal reclamation law.

Respondent's agree with petitioners that it is the congressional purpose behind the reclamation law which governs the determination of the precise issues to be decided by a state court in confirmation proceedings. L.Br. 57; Dist.Br. 15-16. Examination of the legislative history behind the adoption of the 1922 Act, 430 U.S.C. § 511, leads to the identical conclusion reached by the court of appeals

in the case at bench that the *Hewes* decision on the acreage limitation was dicta. By adopting the arguments of petitioners that the *in rem* confirmation proceedings in 1933 constituted a bar to intervention, the district court chose to attribute significance to those proceedings never intended by Congress. To understand the purpose of the confirmation proceedings, it is necessary to carefully review the statutory requirement of the confirmation proceedings in the historic context of the Project Act.

As originally envisioned in the Reclamation Act of 1902, the Secretary, in providing for repayment of project costs by those receiving the benefits of an irrigation project, contracted directly with individual landowners.[149] In 1922, however, the Secretary was authorized to contract for repayment with irrigation districts, with a proviso that "no contract with an irrigation district * * * shall be binding on the United States until the proceedings on the part of the district or the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction * * *."[150] This requirement was carried forward into § 46 of the Omnibus Adjustment Act of 1926 which prohibits delivery of water from reclamation projects until an irrigation district has executed a contract for repayment of construction costs, providing for acreage limitation and "the execution of such contract * * * shall have been confirmed by a decree of a court of competent jurisdiction." Following the established pattern of reclamation law for recouping costs for reclamation projects, § 4(b) of the Project Act directed the Secretary of the Interior to "make provisions for revenue, by contract or otherwise [for] payment of all expenses of construction, operation and maintenance of said [All-American] canal and

[149]Act of June 17, 1902, 32 Stat. 389, 43 U.S.C. § 431.
[150]43 Stat. 541, 43 U.S.C. § 511.

appurtenant structures in the manner provided in reclamation laws."[151] It was pursuant to the above provision that the proceedings to confirm the All-American Canal contract, *Hewes v. All Persons*, were initiated. The United States was neither named nor served in the state action and was not a party to that proceeding. The United States is immune from suit unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Accordingly, the United States is not bound by the *Hewes* decision.

The requirement of court confirmation proceedings first appeared in the Act of May 15, 1922.[152] The purpose of this legislation was to provide a vehicle whereby the United States could forego its repayment contracts with individual landowners in irrigation projects and, in lieu thereof, accept the obligations of irrigation districts organized under state law. As stated in the report on the bill in the House (H.R. 4382):

> The purpose of this bill is to enable the owners, entrymen, and occupants of lands under Government constructed and operated irrigation projects to form irrigation districts under the State law of the State wherein the irrigated lands are located, and when formed in accordance with the State law they shall be recognized as a public corporation * * *. And any lien the Government may have for moneys expended in the procuring of water for the acreage in the district to the individual owner of lands under such ditch or works constructed by the Government is released and passes by virtue of this act to the district body as a whole and is cared for by district assessment and levy, which assessment so levied is chargeable and recovered against the land of the individual owner as debtor. In other words, the Federal Government is dealing with the irrigation district instead of the individual owner or water users' association.
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> * * * * *

[151]45 Stat. 1058, U.S.C. § 617c(b).
[152]43 Stat. 541, 43 U.S.C. § 511.

The general advantages of this proposed legislation may be briefly stated as follows:

* * * * *

13. The laws of all States provide for confirmation proceedings, jurisdiction over all persons being secured by publication, whereby the decree becomes conclusive upon all the world *as to the organization of the district and the validity of the debts incurred.* (Emphasis added.)

* * * * *

17. Where irrigation districts are formed and assume the indebtedness to private creditors or the United States, the liens for construction costs, etc., may be discharged as regards private lands. Then, after the district makes the necessary collections by assessment and levy, as in the case of other municipal corporations, and the only lien required is that which comes into existence annually for the current assessment, such an obligation and lien are not in any sense a legal bar to the enjoyment of the privileges of the Federal farm loan act.[153]

The debates on H.R. 4382 on the floor of the House demonstrate the intention of Congress to remove the lien of the United States upon individual landowners and shift the burden to the districts organized under state law. The only references in the debates to the confirmation proceedings were concerned with whether the confirmation decree would fully secure the lien of the United States. For example, Congressman Kinkaid, sponsor of the bill, offered the following explanation:

> Mr. Kinkaid. * * *
>
> The bill further provides that no contract with an irrigation district shall be binding until the proceedings organizing the district and contracting therewith shall be confirmed by a court of competent jurisdiction. And it further provides that after such confirmation it will be further necessary for the water users in each case, or the owner of the farm unit in each case, to contract in writing with the Secretary of the Interior that he will be bound by the new arrangement and will pay his proportionate share. The bill further requires that before the individual water user's lands are released from liability the Secretary of the Interior shall find that the proceedings are correct; that the district is formed in accordance with the laws of the State in which the district is situated, and that the contract binds the district fully for the liability of the payment of all the construction charges, which liability hitherto rested upon the separate farm units.
>
> * * * * *
>
> Mr. Sanders of Indiana. This proviso seems to contemplate that *the authorization of the execution of a contract* shall be brought in question in some way and decided by a court. (Emphasis supplied.)[154]

Congressman Leatherwood explained the adequacy of the provisions for securing payment of project costs to the United States as follows:[155]

> It is specifically provided that before the Secretary of the Interior shall approve any contract or accept any obligation under the terms of the bill that it shall be made to appear that *a court of competent jurisdiction has passed upon the question of organization of the district and has rendered its solemn decree that all preliminary acts have been done as required by law* and that all things necessary to validate the contract have been done. In other words, you get just such a decree protecting the Government as is had in most cases before investments are made in municipal bonds. (Emphasis added.)[156]

[153] H.R. Rep. No. 662, 67th Cong., 2d Sess. 2 (1922).

[154] 62 Cong.Rec. 3573-74 (1922).

[155] 62 Cong.Rec. 3579-80 (1922).

[156] There were like comments on a similar proposal introduced in the same Congress. *See Hearings on H.R. 2702*, House Comm. on Irr. of Arid Lands, 66 Cong. 2d Sess. (1921); H.R. Rep. No. 1065, 66 Cong., 2d Sess. (1921).

The 1922 legislation only *authorized* the Secretary to contract with irrigation districts. In 1926, the procedure was revised and set out in § 46 *requiring* the execution of a contract with an irrigation district before the United States could deliver any water of a reclamation project, and the language requiring confirmation was condensed to its present form. There is no indication, however, that any change in meaning was intended; in fact, the legislative history of the 1926 Act contains no discussion of the confirmation provision.

Nothing in the legislative history of any part of the reclamation law suggests that Congress expected reclamation law issues to be litigated and determined when a contract was judicially validated.

C. California Law Does Not Authorize The Examination of Federal Reclamation Law In Confirmation Proceedings.

Confirmation proceedings have long been authorized by state law in California, but even under state law it has been recognized that their only purpose is to determine the status of the district (i.e., to obtain a decree that the statutory requirements for organization have been met) and its powers to do certain acts, such as to issue bonds. The original California Statute authorizing the organization of irrigation districts is known as the Wright Act, 1887 Cal.Stat. 29. Under this legislation, the board of directors of an irrigation district was authorized to "execute all necessary contracts" § 11 at 34. There was no reference to confirmation proceedings relating to contracts, but the board was given the discretion to call for elections in the case of special assessments levied to raise money. § 41 at 44.

The Wright Act was amended in 1889. 1889 Cal.Stat. 212. The amended statute again made no reference to

confirmation proceedings for contracts, but authorized the board of directors to commence a special proceeding in the superior court praying that the proposed authorization and sale of bonds "be examined, approved and confirmed by the Court".

In 1897 the California legislature adopted yet another statute for the organization and government of irrigation districts and provided authority for the acquisition of or contracting for irrigation facilities and the distribution of water. 1897 Cal.Stat. 254. The board of directors was required to call an election of its landowners to approve the issuance of bonds. § 30 at 263-64. Thereafter, either the board of directors or an assessment-payer of a district could bring an *in rem* action in the superior court to determine "the validity of any bonds or assessments". § 68 at 276. Section 68 is reproduced in L.App. 166a.

In 1917, the legislature adopted the Irrigation District Federal Cooperation Law, 1917 Cal.Stat. 160 (codified in 1943 as Cal. Water Code § 23175 [West]), providing that any proposed contract with the United States be submitted to the electors of the district in accordance with § 30 of the 1897 Act. It was optional with the board of directors to submit the contract to the superior court "to determine the validity thereof and the authority of the board to enter into such contract". § 3 at 245. Recognizing that there may be a conflict between the rights of landowners in an irrigation district and requirements of federal reclamation law, § 4 of the 1917 Act provided that federal law would prevail.[157]

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[157] "Sec. 4. All water, the right to the use of which is acquired by the district under any contract with the United States shall be distributed and apportioned by the district in accordance with the acts of congress applicable thereto, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of said contract, and provision may be made in the contract between the district and the United States for the refusal of water service to

The early California legislation expressly described the limited purpose of confirmation proceedings and the state courts have recognized that limited purpose. In *Crall v. Board of Directors of Poso Irrigation Dist.*, 87 Cal. 140, 146, 26 P. 797, 798 (1890), the court held that confirmation proceedings concerning the issuance of bonds were for the purpose of determining "the status of the district and its power to issue valid bonds". In *Rialto Irrigation Dist. v. Brandon*, 103 Cal. 384, 386-87, 37 P. 484, 485 (1894), the court characterized confirmation proceedings concerning a bond issue as being "authorized for the express purpose of fixing the legal status of the corporation [i.e., the irrigation district] . . ."

These permissive California statutes fall far short of the "elaborate procedures" alluded to by the landowners. (L.Br. 57) and the exclusive jurisdiction suggested by the District by its reference to *City of Tacoma v. Taxpayers,* 357 U.S. 320 (1958). Dist.Br. 72. As codified in § 23225 of the California Water Code, validation proceedings continue to be discretionary, not mandatory, with irrigation districts.[158] The California legislature did not in

any or all lands which may become delinquent in the payment of any assessment levied for the purpose of carrying out the contract between the district and the United States." This section is now codified in Cal. Water Code § 23200 (West).

[158]The 1917 Act was the applicable statute in 1933 when the *Hewes* proceeding took place. In 1943, the California legislature codified authorization for validation proceedings in Cal. Water Code § 23225 (West). "Validation proceedings. A district may submit any contract or proposed contract and bond issue to the superior court of the county in which is situated the office of the board to determine the validity thereof, the authority of the district to make the contract, and the authority for and the validity of the issuance or transfer of the bond. The validation proceedings shall be had as in the ordinary case of the judicial determination of the validity of district bonds and with like effect." In 1961, § 23225 was amended to read: "An action to determine the validity of any contract and bonds may be brought pursuant to Chapter 9 (Section 860) of Title 10 of Part 2 of the Code of Civil Procedure." Code Civ. Proc. § 860 (West) provides: "Authority of public agency;

any way indicate an intention to allow those proceedings to nullify an existing law of the United States, and the state court's attempt in *Hewes* to interpret the contract and adjudicate the rights of the United States as well as present and future beneficiaries under the contract in their absence, went beyond the authority of the court.

The California Supreme Court is in complete accord with the statutory scheme and its earlier decisions. Justice Peters' opinion in *Ivanhoe,* following remand from this Court, explicitly stated that ". . . the only issue involved [in a confirmation proceeding in addition to the District's capacity to contract] is the validity of the contract". *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 699, 3 Cal.Rptr. 317, 320, 350 P.2d 69, 72 (1960). Landowners emphasize that the *Ivanhoe* proceeding is one where both the California Supreme Court and this Court recognized the propriety of considering the issue of the acreage limitation. L.Br. 59. Landowners' emphasis is misplaced, for Justice Peters addressed that precise point after the state court's earlier decision had been reversed.

> The duty of the trial court was to determine whether or not the contract was valid and entitled to confirmation. *It was not to determine what the various parties claimed were their rights and duties under the contract.* Such claims could be settled only by adjudication between the parties themselves. Thus the claims of parties, especially parties not before the court, were irrelevant. 53 Cal.2d at 727-28, 3 Cal.Rptr. at 338, 350 P.2d at 90. (Emphasis added)

time for proceedings; venue; nature of action. A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this and for sixty days thereafter bring an action in the Superior Court of the County in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem."

The second California *Ivanhoe* decision was unanimous and recognized its previous mistaken foray into unauthorized territory.

The status of irrelevant matter decided by the Imperial County Superior Court is no greater than that accorded by California's appellate courts. Full faith and credit calls for the same respect, not the additional respect in the federal courts sought by petitioners.

The efforts of landowners to find support in *California v. United States,* 438 U.S. 645, 675 (1978) for an elusive congressional purpose in the reclamation law of deferring to both the substance and form of state water law does not assist them in this dispute. L.Br. 58. The principles of comity and federalism are not in conflict in the present case because the Ninth Circuit's treatment of the *Hewes'* judgment is consistent with both California law and the federal interest in implementation of national reclamation policy. If there is any relevance in this Court's opinion to the present dispute, it is found at 438 U.S. 668-69, n. 21, where the 160-acre limitation set out in § 5 of the 1902 Act is recognized as a specific, congressional directive to the Secretary prevailing over any deference to be accorded state law.[159]

[159]Landowners' reliance upon other state court confirmation proceedings to support their contention that there is authority to determine federal reclamation law is mistaken. L.Br. 59. *In re Owl Creek Irr. Dist.,* 71 Wyo. 30, 253 P.2d 867, *on pet. for reh.,* 258 P.2d 220 (1963) was a petition to both enlarge the borders of an irrigation district and to confirm a contract between the irrigation district and the United States providing for recordable contracts to carry out the 160-acre limitation. The contract was held to be invalid under state law. The commissioners of the irrigation district were found not to have authority to enlarge the boundaries of an irrigation district and make the new landowners subject to federal reclamation law. There was no attempt to interpret federal law. In *McLean v. Truckee—Carson Irr. Dist.,* 49 Nev. 278, 292, 245 Pac. 285, 289 (1926), the Nevada Supreme Court made it clear that it did not have the authority to interpret federal law and was simply concerned with determining the validity of the contract and the authority of the irrigation district to enter into it.

> "We are not concerned with the question raised as to the construction of the proposed contract or its enforceability in its present form. The question put to the lower court was whether the contract was valid and such as the board of directors of the district were authorized to enter into." 49 Nev. at 292, 245 P. at 289.

The other authorities cited by the landowners similarly rejected their contentions made in this Court. *Hillcrest Irr. Dist. v. Brose,* 24 Idaho 376, 133 P. 663 (1913) was decided in a manner at odds with the broad scope of jurisdiction asserted by petitioners. The irrigation district sought a determination that it was legally organized in accordance with state law, the proceedings of the district leading up to and authorizing issuance of bonds were valid in accord with state law, and execution of a contract with the United States was in harmony with reclamation law. The court concluded that the district had the power and authority to enter into a binding agreement. The references to reclamation law mean simply that "the Secretary had the power to enter into such a contract under the provisions of the act of June 17, 1902, known as the 'Reclamation Act' ". 131 P. at 664. This was the identical interpretation of an earlier Idaho case also relied upon by landowners, *Pioneer Irr. Dist. v. Stone,* 23 Idaho 344, 130 P. 382, 383 (1913).

D. *Res Judicata* is not an inflexible rule and does not apply in cases involving important considerations of policy where its application would defeat the ends of justice.

The doctrine of *res judicata* has never been applied in the rigid and inflexible fashion urged by petitioners in a case involving important considerations of policy where to do so would be contrary to the interests of justice. The district judge recognized that the determination of the applicability of reclamation law in the Imperial Valley involves "important considerations of national policy". 322 F.Supp. at 16. The court of appeals did not find it necessary to consider whether or not important policy considerations mandate the inapplicability of *res judicata* principles in litigation concerning the acreage limitation question. 559 F.2d at 526 n. 31.

There can be no justification for allowing a non-adversary state trial court decision to have the conclusive effect urged by petitioners. Water in the arid regions of the Western states is often referred to as "liquid gold." Without it, farmers in desert areas like the Imperial Valley could grow nothing, no matter how much they spent on improvements. There was no finding by the district court of detrimental reliance by anyone on the *Hewes* decision or the Wilbur letter. Neither the government nor respondents have demanded that the excess landowners return the incalculable benefits provided to them the past four decades which were intended for others.

The subsidy in the case at bar is a recurring one and, if petitioners prevail, the handful of large landowners whose petitions are before this Court will retain the irrigation benefits in perpetuity. The 160 acre limitation involves important considerations of national policy. It is this Court, not the Imperial County Superior Court, that is charged with determining the identities of the individuals upon whom Congress intended to bestow this vast and virtually unlimited federal subsidy. The congressional purpose has been expressed, time and time again, to dispense the water subsidy for the exclusive benefit of family sized farms. The Court accorded recognition to this policy in clear and unmistakable language in its *Ivanhoe* opinion, when Justice Clark speaking for a unanimous Court, said:

> From the beginning of the Federal Reclamation Program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the greatest number of people, consistent, of course, with the public good. This policy has been accomplished by limiting the quantity of land in a single ownership to which project water might be supplied. It has been applied to public land opened up for entry under the reclamation law as well as privately owned lands, which might receive project water. See Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 Yale Law Journal, 477. 357 U.S. at 292.

The attempted application of *res judicata* in the present case presents unique circumstances and the issue arises only because the government failed to appeal. Its application would result in completely frustrating national reclamation policy, for petitioners cannot seriously contend that the Reclamation Act was designed for the large landowners of the Imperial Valley but for family sized farms elsewhere in the 17 Western reclamation states. As the authorities hereafter cited demonstrate, the courts have declined to apply *res judicata* in circumstances where it application would defeat the ends of justice.

Both federal and state courts recognize an exception to *res judicata*, as does the proposed revision of the Restatement, where warranted by the interests of justice. The authorities have blurred the distinction between *res judicata* and its sister doctrine of collateral estoppel. Whatever those distinctions may have been in the past, the near impossibility of carefully separating their respective interests and principles has been recognized by the latest proposed draft of the Restatement which treats them as "direct estoppel" and "collateral estoppel". Restatement of Judgments (Second) § 68b, Tentative Draft No. 4 (1977).

This Court has recognized the general rule of finality of jurisdictional determinations to be subject to exceptions. *Durfee v. Duke*, 375 U.S. 106, 114-115 (1963). Other courts have determined that general principles of equity will not be applied to frustrate the purpose of law or to thwart public policy. *United States v. Pan American Petroleum Co.*, 55 F.2d 753, 776 (9th Cir. 1932) *cert denied*, 287 U.S. 612; *White v. Adler*, 289 N.Y. 34, 43 N.E.2d 798, 803 (1942). The Court follows the general rule where there has been

an intervening decision or change in the law after the initial judgment. *State Farm Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945); *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948). In recognition of the profound public importance of the reclamation program in the West, the Ninth Circuit has adopted a flexible approach to *res judicata* and has reconsidered an earlier decision where the precise question of law was determined. *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1094-1098.

> Nevertheless, in view of the importance of the question, and the opportunity this case has given to examine it more fully, we have considered the legislative history of the Flood Control Act of 1944 at some length. *Id.*, 535 F.2d at 1098.

One commentator observed that exceptions to the hard rules on *res judicata* represent

> an enforced tribute to human reluctance to let controversial issues stay settled. Laymen more than lawyers, and lawyers perhaps more than judges, but even judges to some extent, are moved by the appeal of afterthought and afterdiscovery. It is indeed a problem to set acceptable boundary lines between the normal and very necessary rule of repose and the scattering concessions to people with hard cases. Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation.* 48 Harv.L.Rev. 1281, 1331 (1935).

The tentative draft of the Restatement is in complete accord for it recognizes an exception to the general rule of preclusion where:

> (b) The issue is one of law and . . . (ii) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

> (c) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts . . . or
>
> * * *
>
> (e) There is a clear and convincing need for a new determination of the issue (i) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, . . . *Restatement Judgments, supra,* § 68.1.

The Restatement is in accord with the prevailing view of the courts.[160]

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[160] "[R]es judicata, as the embodiment of a public policy, must, at times, be weighed against competing interests, and must, on occasion, yield to other policies" *Spilker v. Hankin*, 188 F.2d 35, 39 (D.C. Cir. 1951). See also *Burns Bros. v. Central R.R.*, 202 F.2d 910 (2d Cir. 1953) (at the time of the first action, only one of two remedies was available); *United States v. Pan American Petroleum Co.*, 55 F.2d 753, 782 (9th Cir. 1932), *cert. denied*, 287 U.S. 612 (special interest of the government); *Creek Nation v. United States*, 168 Ct.Cl. 483 (1964) (a change in the law); *Light v. Adler*, 289 N.Y. 34, 43 N.E.2d 798 (1942) (splitting a cause of action as a result of defendant's conduct); *State ex rel. Light Pine Sash Co. v. Superior Ct.*, 145 Wash. 576, 261 P. 110, 111 (1927) (public policy and little inconvenience to defendant). The doctrine of *res judicata* is not to be used in circumstances which would violate principles of public policy or submerge the plan of Congress for the administration and enforcement of its policy. *Denver Bldg. and Const. Tr.C. v. NLRB*, 186 F.2d 326, 332 (D.C. Cir. 1950), *rev'd on other grounds*, 341 U.S. 675 (1951); *Pearlstein v. Scudder & German*, 429 F.2d 1136, 1143 (2d Cir. 1970), *cert. denied*, 401 U.S. 1013.

Other courts have refused to apply traditional *res judicata* rules when to do so would be unfair or unjust. *Adams v. Pearson*, 411 Ill. 431, 104 N.E.2d 267 (1952); *Flanagan v. Flanagan*, 73 N.Y.S.2d 267 (Sup. Ct. 1947), *modified*, 273 App. Div. 918, 77 N.Y.S.2d 682 (1948), *aff'd*, 298 N.Y. 787, 83 N.E.2d 473 (1948). Both collateral estoppel and *res judicata* are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice. *Tipler v. E. I. duPont de Nemours and Co.*, 443 F.2d 125 (6th Cir. 1971); *Application of Fried*, 312 F.2d 930, 931 (Court of Customs & Patent Appeals, 1963); *United States v. Frew*, 187 F.Supp. 500, 506 (E.D. Mich. 1960) (criminal prosecution for sending obscene matter through the mails); *Yates v. United States*, 354 U.S. 298, 336 (1957) (conspiring to overthrow the Government

The California Supreme Court follows a similar flexible rule:

> That principle [of *res judicata*] is not to be applied so rigidly as to defeat the ends of justice; there are exceptions to it, based upon important reasons of policy, . . . *Guardianship of DiCarlo,* 3 Cal.2d 225, 235, 44 P.2d 562, 99 A.L.R. 990 (1935). *Accord, Greenfield v. Mather,* 32 Cal.2d 23, 35, 194 P.2d 1, 8 (1948).

Although a subsequent change in the law, standing alone, may not justify an exception to according *res judicata* effect to a prior judgment between the identical parties in California (*Slater v. Blackwood,* 15 Cal.3d 791, 796, 126 Cal.Rptr. 225, 228, 543 P.2d 593 [1975]), preclusion will not be applied to foreclose relitigation of an issue concerning a public agency's ongoing obligation to administer a statute enacted for the public benefit affecting members of the public not before the court. *Chern v. Bank of America,* 15 Cal.3d 866, 872, 127 Cal.Rptr. 110, 113, 544 P.2d 1310, 1313 (1976); *Louis Stores Inc. v. Department of Alcoholic Beverage Control,* 57 Cal.2d 749, 757-58, 22 Cal.Rptr. 14, 18, 371 P.2d 758, 762 (1962); *California Optometric Assn. v. Lackner,* 60 Cal.App.3d 500, 505, 131 Cal.Rptr. 744, 747 (1976). Even if all elements of *res judicata* are present, the court is empowered to refuse to apply the doctrine "to prevent defeat of the ends of justice". *In re Marriage of Hight,* 67 Cal.App.3d 498, 503, 136 Cal.Rptr. 685, 687 (1977). It has not been applied if there was not a "fair opportunity to litigate" (*Id.,* 67 Cal.App.3d at 503, 136 Cal.Rptr. at 687), and if the party sought to be precluded did not "participate in the control of the action and if the judgment is adverse, be able to determine whether or not an appeal should be taken", for being a nominal party is insufficient. *Id.,* 3

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and violating the Smith Act); *Powers v. Floersheim,* 256 Cal.App.2d 223, 230, 63 Cal.Rptr. 913 (1967) *cert. denied,* 391 U.S. 951 (action to enjoin parties from engaging in business as a collection agency without a license).

Cal.App.3d at 504, 136 Cal.Rptr. at 688. Finally, the parameters of the exception are to be determined by the "quality and intensity of the public interest involved" in determining if there should be a reexamination of the issues. *Chern v. Bank of America, supra,* 15 Cal.3d at 873, 127 Cal.Rptr. at 114, 544 P.2d at 1314.

The acreage limitation question need not have been considered by the superior court in *Hewes.* The only questions for determination were the status of the District and the validity of the contract. The government was desirous of having the contract confirmed so that the validity of the contract would not be raised at a later time and make it impossible for the District to meet its financial obligations on repayment. The contract was determined to be valid and no party in this or any other forum have ever asserted that the contract is invalid. The courts of the State of California recognize that irrelevant matters decided in prior litigation do not have preclusive effect in later litigation. The manifest importance of the acreage limitation issue militates against deciding this case on a technicality raised only because the government failed to appeal the judgment of the district court.

V. RESPONDENTS HAVE AN APPEALABLE INTEREST IN PURSUING THE JUDGMENT OF THE DISTRICT COURT.

Respondents are 123 residents of the Imperial Valley who want to buy some of the excess lands owned by the landowner petitioners at below market prices as mandated by § 46. The respondents had appeared in this case in the role of an *amicus curiae.* When the government failed to appeal the judgment of the district court, they moved to intervene for purposes of pursuing the appeal in order to

protect their interest in having the excess lands sold under recordable contract as provided in § 46. The court of appeals concluded that respondents met the requirements of standing so as to have an appealable interest in pursuing the judgment. Petitioners, who understandably would prefer to have this case decided on the jurisdictional issue alone without reaching the merits, challenge respondents' appealable interest alone. They raise no question about the other aspects of Rule 24, Fed.R.Civ.P.

Petitioners' attack is characterized by an almost total failure to recognize the unique features of § 46. The record developed at trial, along with the current administrative practice of the Interior Department establish that respondents' injury, their inability to buy excess lands at below market prices, is almost certain to be remedied when the landowner-petitioners execute recordable contracts in compliance with § 46.

A. The district court decision on the merits would have become a bar to respondents if it became final.

The judgment of the district court would have forever barred respondents from having an opportunity to purchase excess lands in the Imperial Valley at below market prices if they had not intervened when the government failed to appeal. This bar is recognized by the District, for it urges this Court to vacate the decision of the court of appeals in order to leave the judgment of the district court "intact as *res judicata*". Dist.Br. 85. Intervenors, such as respondents, have an interest in appealing from a judgment where necessary to avoid the *res judicata* effect of the judgment and to protect their direct and substantial interest in the outcome of the case. *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 281-83 (1946); *Chicago v. Atchison, T. & S.F. R. Co.*, 357 U.S. 77, 83 (1958). This interest may be pursued, even where one of the original parties does

not appeal the adverse decision of the lower court. *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 525 n. 4 (1949).

B. Respondents meet the constitutional test of standing because execution of recordable contracts will redress their inability to buy excess lands at below market prices.

This Court recently had occasion to explain the applicable principles in making a determination of a party's standing. Mr. Chief Justice Burger's opinion in *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 (1978) stated it this way:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assume that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions". *Baker v. Carr*, 369 U.S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the Plaintiff, *Warth v. Seldin*, 422 U.S. 490, 501 (1975), but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Develop. Corp.*, 429 U.S. 252, 261 (1977). See also *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

If the decision of the court of appeals is affirmed, approximately 265,000 acres of excess lands will be sold under the price control restrictions of § 46 at below market prices. This result is a certainty mandated by § 46 and will make many family-sized farms available for purchase in the Imperial Valley at prices which do not include the incremental value brought about by the Project Act. Without

the project, the land would be desert and almost worthless.[161] In reaching its conclusion that respondents had the requisite standing to pursue the appeal, the Ninth Circuit pointedly observed:

> This injury (the payment of prices higher than they would have to pay for farm land if § 46 applied to the private landowners in the Imperial Valley) stems directly from the lack of recordable contracts required by Section 46. In the absence of a requirement that landowners execute such a contract in order to receive irrigation water, it is inconceivable that any landowner would sell any land at prices substantially below current market prices.
>
> Furthermore, this injury would be redressed by a court order declaring the applicability of Section 46. There would be no need to bring additional parties before the district court before such an order could be issued . . . . Once the appraisal process was completed, formerly large agricultural landholdings would be available in small parcels at prices below the current market price. 559 F.2d at 522.

Petitioners are overly pessimistic about respondents' purported inability to purchase the excess lands, no matter what the selling price may be. Respondents were not required to establish with absolute certainty that they would be able to purchase the excess lands, for this Court noted in *Arlington Heights* that the requested injunctive relief there "would not guarantee that the project would be built" because the builder would still have to secure financing, qualify for federal subsidies and carry through with construction. 429 U.S. at 261. In the case at bench, as much as one hundred percent financing is available from the

[161] Report of Special Master 15; 1 CR 169, 170, Con. App. 324a; 4 Tr. 351-16, 388, 22-25, 423:23-25.

Farmers Home Administration for the purchase of farms and equipment.[162]

Respondents were not required to establish themselves as pillars of the financial community, having either the requisite capital or borrowing power to enable them to purchase the excess lands, as suggested by landowners (L.Br. 67), any more than the individual plaintiff in *Arlington Heights* was required to establish his ability to pay the rent in the proposed housing development. Since the record is uncontradicted from the Yellen affidavit that the ex-contract market value of farm land in the Imperial Valley was approximately $25 to $50 per acre at the time respondents sought leave to intervene, while irrigated lands had a value of between $1,200 to $1,400 per acre, it is unlikely that respondents would have any difficulty obtaining sufficient funds either through private or government lending sources.

Arguably, the purchase of farms, as with housing developments, is subject to similar uncertainties, a factor recognized by the Court in *Arlington Heights*. In *Arlington*

[162] The Farmers Home Administration is an agency of the government with the primary purpose of assisting persons such as petitioners with the necessary funds to begin family farming operations. "The basic objectives of the Farmers Home Administration is making F.O. [Farm Ownership] loans are to assist eligible applicants to become owner-operators of family farms, to make efficient use of land, labor and other resources, to carry on sound and successful operations on the farm, and to enable farm families to have a reasonable standard of living. . . . These objectives will be accomplished through the extension of credit and supervisory assistance, recognizing the need for additional help to limited resource farmers." 7 C.F.R. § 1943.2. *See generally*, 7 C.F.R. § 1943.1-1943.50. The Farmers Home Administration will make insured ownership loans up to $200,000.00 and guarantee loans for up to $300,000.00. *Farm Ownership Loans* (Farmers Home Administration 1979). It will make direct farm operating loans of up to $100,000.00 and will guarantee up to $200,000.00 for operating purposes. *Farm Operating Loans, Programs Aid No. 1002* (U.S. Govt. Printing Office 1979, No. 666-819.)

Heights, one Ransom, an individual plaintiff who alleged that he was seeking and would qualify for the proposed housing project, was found to have standing. He testified that if the project was built, "he would probably move there, since it is closer to his job." 429 U.S. at 264. His asserted injury was that "his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory. If the court grants the relief he seeks, there is at least a 'substantial probability', *Warth v. Seldin, supra,* at 504, that the Lincoln Green project will materialize, affording Ransom the housing opportunity he seeks in Arlington Heights. His is not a generalized grievance. Instead, as suggested in *Warth, supra* at 507, 508, n. 18, it focuses on a particular project and is not dependent on speculation about the possible actions of third parties not before the court. See *id.,* at 505; *Simon v. Eastern Ky. Welfare Rights, Org.,* 426 U.S., at 41-42. Unlike the individual plaintiffs in *Warth,* Ransom has adequately averred an actionable causal relationship between Arlington Heights' zoning practices and his asserted injury. *Warth v. Seldin, supra,* at 507." 429 U.S. at 264.

In view of this Court's decision in *Arlington Heights,* the court of appeals in the case at bench had no choice but to conclude that respondents had standing. The execution of recordable contracts will definitely result in the sale of over a quarter million acres of some of the finest farmland in the world at below market prices. Under the Secretary's proposed regulations, respondents, as residents of the Imperial Valley, are at the top of the category of eligible purchasers. There is at least as much of a "substantial probability" that they will be among the lucky purchasers as that Mr. Ransom would move into the unbuilt housing project in Arlington Heights. Both respondents and Mr. Ransom have been "thwarted by official action". The actions of third parties are not necessary to

bring about relief. There is a direct "actionable causal relationship" between the District's refusal to require the few hundred excess landowners to execute recordable contracts and respondents' injury. The court of appeals concluded there would be a substantial likelihood that respondents would be able to purchase some of the excess acreage of rich farmland whose productivity depends *entirely* upon the federal subsidy Congress intended for family-size farmers.

Warth v. Seldin, 422 U.S. 490 (1975) does not require a different result. The plaintiffs in *Warth* could not establish the likelihood of obtaining housing absent the restrictive zoning, because realization of their desire for low cost housing was completely dependent upon the efforts and willingness of third parties to build low and moderate cost housing. 422 U.S. at 505. By contrast, respondents in the present case are not dependent upon any third parties for relief. The execution of recordable contracts will result in a quarter million acres of rich farmland going on sale at below market prices. Sales prices will be determined without reference to the incremental value of the land resulting from the federal project. Respondent Yellen and landowners are in substantial agreement that the excess lands have very little value without the subsidized water. In *Warth,* it was alleged that the petitioners' had needs specifically for low-cost housing and thus they were completely dependent upon the willingness of third parties to construct that type of housing. In the present case, respondents do not need the assistance of anyone to make low-cost farmland available. Thus, there is a substantial probability that respondents will be able to achieve their objectives when the excess landowners comply with the requirements of § 46.

Petitioners' response to *Arlington Heights,* referred to repeatedly by the Ninth Circuit, is to ignore it. It is only

by ignoring *Arlington Heights* that the District is able to set up imaginary road-blocks to respondents' standing, because (i) the Secretary could not force a landowner to sell his excess lands, (ii) a selling landowner might not select respondents as buyers, and (iii) respondents would not have "a preference in any respect against any other citizen of the United States, wherever he resides". Dist. Br. 79.

The District appears to be as unaware of the legal precedents and current administrative practice of the Department of Interior as regards the source of repayment of the All-American Canal contract. Its argument is without merit because:

(i) The recordable contract has been the statutory device for procuring compliance with the acreage limitation since 1926. There is no evidence in the record of any excess landowner declining to sign a recordable contract. To the contrary, the District's own counsel told a congressional committee that excess landowners who receive project water on their excess lands "for ten years without having to sell it can make enough money out of it so he can afford to sell it at any old price." *Hearings on S. 1425, 2541, 3448,* Before Sub-Comm. on Irrig. and Reclamation of Senate Comm. on Interior and Insular Affairs, 85th Cong., 2d Sess. 87, 88 (1958). The excess landowners testifying at trial, some of whom have been receiving project water for almost forty years, testified that their land has no other use than farming. The only possible use for their lands would be to raise "rattlesnakes and rabbits". 4 Tr. 351:13-16. Any suggestion that the handful of excess landowners could use their acreage for other purposes and simply refuse to execute recordable contracts is totally unrealistic, unless they intend to turn the Imperial Valley into a vast reptile and rodent sanctuary. The Secretary has always allowed a period of time to dispose of excess lands and water deliveries continue during the interval. The only means available for the landowners to recoup their investments for

improvements would be to sell their excess lands. (The value of improvements would be included in the sale price. *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093, 1144.)

(ii) The Secretary has been delegated authority under § 10 of the 1902 Act, 43 U.S.C. § 373 and § 46 to adopt the form of recordable contract necessary to carry out the purpose and policies of the Reclamation Act. His proposed regulations, adopted under compulsion of a court order which has now become final, and relied on elsewhere by the District in its brief, specifically denies to the excess landowner the privilege of selecting his own buyer if he elects to accept project water for his excess lands. The 1979 Solicitor's Opinion dealing with subsequent sales, M-36913, 86 I.D. 300, makes it perfectly clear that a landowner who does elect to receive project water for his excess lands will be able to do so only on condition that he surrender his right to sell his land to a person of his own choosing.

(iii) The Secretary's proposed regulations and the December 6, 1979 Opinion of his Solicitor concerning the residency requirement, M-36919, established priorities among eligible, non-excess owners. It is true that at present, persons residing throughout the United States and probably throughout the world own approximately one-half of the irrigable farmland provided with irrigation water through the All-American Canal in the Imperial Valley. However, under the proposed regulations, only those persons otherwise eligible who have their principal place of residence within fifty miles of the excess lands they seek to purchase will be eligible. Respondents fall within the definition of eligible non-excess owners.[163]

[163]The District suggests that respondents were initially allowed to intervene "by mistake" of the Court of Appeals, in that the court considered them to be landowners instead of non-landowners. Dist.Br. 77. The error was insignificant to the decision allowing the initial intervention. Neither the District nor the landowners sought re-hearing or other relief as they would have been expected to do if the error was of any consequence.

Petitioners can not seriously challenge the court of appeals' determination that the requirement that owners of excess lands execute recordable contracts would redress respondents' inability to purchase farm land at prices inflated by the incremental value of the project. Petitioners' contention on standing not only has no validity in general but it also completely ignores the unique mechanism of the recordable contract in § 46. The Court has only recently concluded that standing may result where there is market activity having an effect on market prices. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 110-11, 115 (1979). The recordable contract will have a definite effect in bringing about a large disposition of over a quarter million acres of rich farmland in the Imperial Valley having a dependable supply of irrigation water at below market prices. Congress did not provide a similar statutory device to enforce the residency requirement and therefore the court of appeals determined that respondents lacked standing in that case.

Petitioners presented the claim that the panel's decision in the acreage and residency cases was internally inconsistent, as well as being in conflict with other Ninth Circuit cases involving standing to raise issues under the Reclamation Act, *Bowker v. Morton,* 541 F.2d 1347 (9th Cir. 1976), and *Turner v. Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966). In denying rehearing, the panel carefully pointed out the significance of the recordable contract in the acreage case at bench and how the procedural issue was in a different posture in this case than in the others. 595 F.2d at 527-28. Petitioners' suggestions for rehearing in banc were passed on to the full court, and no judge of the Ninth Circuit requested a vote on the suggestions. 595 F.2d at 528. Apparently, the Ninth Circuit was satisfied that the decision on standing in the case at bench was completely consistent with all of its earlier decisions under the

Reclamation Act. This Congressionally mandated procedure, having no parallel elsewhere in the law, provides, at the very least, a "substantial probability" that the respondents will become family farmers in the Imperial Valley, enjoying the vast water subsidy Congress intended for them, rather than the 150 farming operations who own most of the excess lands.

C. The repayment of one-half of the construction costs does not eliminate the price control provision of § 46 for the initial breakup of excess lands.

Thirteen and one-half years after Solicitor Barry issued his Opinion and eleven years after the government filed its complaint, the District reached the half-way mark in its repayment contract with the government, having repaid one-half of the costs of constructing the All American Canal from revenues received from the sale of hydroelectric power. After the court of appeals filed its principal opinion on August 18, 1977, the District and the landowners petitioned for rehearing and suggested rehearing in banc. For the very first time in this litigation, the District challenged the jurisdiction of the Secretary to exercise the price control device of § 46. The District has filed in this Court an Affidavit of Robert F. Carter, an official of the District. Dist. App. 243a. Although this Affidavit is not part of the record on appeal, respondents shall treat it as a correct statement of the facts it reports.

The court of appeals declined to reconsider its principal opinion because, as it previously held in *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093, the payoff language of § 46 does not apply to the *initial* breakup of excess lands, but only to *subsequent* sales. Referring to its opinion in *Tulare,* the court said:

> . . . the statement in Section 46 that in the initial breakup of excess lands the Secretary of the Interior

must fix the sale price "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works" applies regardless of the fact that construction charges for the irrigation project have been repaid. This decision expressly applies to all federal reclamation projects subject to Section 46. *Id.* [535 F.2d] at 1118. As we recognized in our opinion [in the present case] of August 18, 1977, 559 F.2d at 514, 522, the irrigation works added substantial value to the land for agricultural purposes, and thus it is only reasonable to infer that sales under the *Tulare* formula will be at the low-market price. 595 F.2d at 527.

The District's facile assertion that the court's decision "flies so directly in the face of the statute as to require no argument" (Dist.Br. 84) not only attempts to treat a single part of Section 46 completely out of context, but also disregards the purpose of the statutory language and contains an implication finding no support in either the administrative practice or judicial decisions under the reclamation law.

The issue decided by the Ninth Circuit in the present case and *Tulare* was previously determined administratively by Solicitor Barry in a formal opinion. Sol. Op. M-36634, 68 I.D. 372 (1961). Solicitor Barry reported that the crucial element in Section 46 of the Omnibus Adjustment Act and Section 12 of the Reclamation Extension Act of August 13, 1914, 38 Stat. 686, 43 U.S.C. § 418, from which it was derived, was the "requirement for the sale of excess land at a limited price". 68 I.D. at 377. This "crucial element" represented a change in earlier reclamation enactments and "came about because of the resolve of the Congress, as a matter of deliberate policy, to prescribe by statute measures aimed specifically at the early breakup of pre-existing large holdings. The Congress so acted . . . because the 1902 and 1912 Acts had not achieved any

substantial breakup of large pre-existing private holdings." *Ibid.*

In a lengthy, carefully documented opinion by Chief Judge Browning, the Ninth Circuit in *Tulare* described the evolution of the Reclamation Act from its enactment in 1902 through the adoption of Section 46 in 1926 and the administrative interpretations of Section 46 after its enactment. 535 F.2d at 1119-1143. *Tulare* involved a contention that repayment of construction costs relieves a landowner from the requirement to execute the recordable contract mandated by Section 46. The Ninth Circuit rejected the argument as being completely inconsistent with the basic goal of the reclamation law "to create family-*sized* farms in areas irrigated by federal projects". (emphasis added) 535 F.2d at 1119. The goal is not to create "family farms" of whatever size, as suggested by the landowners, but family-*sized* farms as defined by Congress, i.e., 160 acres.

Examination of Section 46 shows that it is broken down into two segments. The first part refers to the initial breakup of excess lands and does not contain any language restricting the requirement that the Secretary assert price control:

> All irrigable land held in private ownership by any one owner in excess of one hundred sixty irrigable acres shall be appraised . . . and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value . . . without reference to the proposed construction of the irrigation works . . . and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to extend those fixed by the Secretary of the Interior;

Following the first segment of Section 46, broken off by the semicolon, is the language dealing with subsequent sales where the limitation on the Secretary's authority to control prices expires upon the repayment of one-half of the construction costs:

> and that until one-half of the construction charges against such lands shall have been fully paid, no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary . . .

The Ninth Circuit held in *Tulare* that Section 46 "leaves no room for an implied option to avoid initial breakup of excess land holdings by paying construction costs." 535 F.2d at 1135. Although the landowners in *Tulare* sought to be freed from the requirement to sell their excess lands at below market prices by paying their share of the construction costs in advance, that factor is not significant here, for the District's attack on *Tulare* is openly on the substance of that opinion. Dist. Br. 84. It was the payment of one-half of the construction charges which was the basis of the claim in *Tulare* that the questioned language "recognizes at least a partial 'payout' theory". 535 F.2d 1134. The Ninth Circuit wasted little time disposing of this contention:

> This is a patent misconstruction of the meaning and purpose of the clause in question. Its purpose and effect was to strengthen the Secretary's hand in dealing with speculative sales, not to weaken it by permitting avoidance of price control by partial "payout". *Ibid.*

The *Tulare* opinion stands for the proposition that there must be an initial breakup of excess lands and that the repayment of construction costs, either entirely as in *Tulare,* or one-half as in *Imperial,* does not provide a built in opportunity to circumvent the law.

The District wants this Court to infer that the Department of Interior has adopted an administrative practice of recognizing the expiration of the Secretary's authority to assert price control after one-half of the construction costs are repaid, relying upon the 1979 Solicitor's Opinion on subsequent sales. M-36913, 86 I.D. 300, (1979). Dist. Br. 74. The District has entirely misconceived the meaning of that Opinion. The subject of the Opinion is "Control of the Sale Price of Formerly Excess Lands". The language quoted from page 1 of the Opinion specifically states that Section 46 requires the Secretary to control and approve the purchase price of *initial* sales of excess land and *thereafter resales* until one-half of the construction costs have been repaid. The Opinion itself is concerned exclusively with the *resale* of formerly excess lands and is entitled "Reclamation Law—Control of the Sale Price of Formerly Excess Lands". The Opinion was intended to interpret the requirements of the law applicable to "turn-around" sales of excess lands, and placed heavy reliance (at pp. 4, 5 and 8) upon the very opinion of the Ninth Circuit the District seeks to disregard, *United States v. Tulare Lake Canal Co.* The proposed regulations are consistent with both the Solicitor's Opinion on subsequent sales and *Tulare.* 43 C.F.R. § 426.10(a), Dist.App.237a. As long as land is under recordable contract, price control will be "required regardless of the status of payment of construction charges". *Ibid.* A landowner is required to execute a recordable contract only when he owns excess lands prior to the initial breakup. After the initial breakup, they are no longer under a recordable contract. It is at that point in time, *after* the initial breakup, that the Secretary's authority to control prices is effective only until one-half of the construction costs are repaid.

During pre-litigation negotiations with the District, the Department of Interior indicated it would be willing to

recommend to Congress that legislation be adopted to allow excess lands in the District to be appraised at current market prices. 3 Tr. 185:25-188:13, 595 F.2d at 527. Pl. Exs. 8A-8Q. Those negotiations were unsuccessful and the District elected to take its chances in court. It is now too late to complain about the outcome.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

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Respectfully submitted,

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